Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-394

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,

Petitioner,

—v.—

PAUL MOYNAHAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN F. MULCAHY, JR.
ROBERT E. BEACH, JR.
Office of the Chief State's Attorney
Drawer H, Amity Station
New Haven, Connecticut 06525
Attorneys for Petitioner

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of Facts Material to the Federal Questions	3
Reasons for Granting the Writ	17
CONCLUSION	36

INDEX TO APPENDICES

Appendix A—Judgment, United States Court of Appeals Second Circuit, May 31, 1977	A-1
Appendix B—Denial of Petition for Re-Hearing, July 14, 1977	A-3
Appendix C—Opinion of United States District Court, District of Connecticut, August 31, 1976: *Moynahan* v. *Manson, Commissioner of Correction of the State of Connecticut*, Civil No. H-218	A-5
Appendix D—Trial testimony of Edward Miller ("dry-run")	A-35
Appendix E—Summation (Comment on invocation of Fifth Amendment privilege by witness called by State)	A-46

PAGE

Appendix F—Curative Instruction to Jury A-47

Appendix G—Pertinent Provisions of United States' Constitution A-48

TABLE OF CASES

Alford v. *United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931) 18

Atwood v. *Welton*, 7 Conn. 66 (1828) 20

Brady v. *Maryland*, 373 U.S. 83 (1963) 3, 14

Brookhart v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966) 18

Cain v. *Cupp*, 442 F.2d 356 (9th Cir. 1971) 33

Cota v. *Eyman*, 453 F.2d 691 (9th Cir. 1971). 33, 34, 36

Davis v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974) 2, 11, 12, 14, 18, 19, 20, 24, 25, 27

Douglas v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965) 18, 31, 33, 35

Frazier v. *Cupp*, 394 U.S. 731 (1969) 31, 32, 33, 35

Gerberding v. *United States*, 471 F.2d 55 (8th Cir. 1973) 33, 36

Gilbert v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967) 26

Giles v. *Maryland*, 386 U.S. 66 (1967) 28, 29

Green v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959) 18

Harris v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) 20

PAGE

Moore v. *Illinois*, 408 U.S. 786 (1972) 28

Namet v. *United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed. 2d 278 (1963) 14, 31, 32, 34, 35

Pointer v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965) 18

Queen v. *Gagliola*, 162 Conn. 164 (1972) 32

Schaefer v. *Leone*, 443 F.2d 182 (2d Cir. 1971) ... 27

Smith v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968) 18

Snyder v. *Coiner*, 510 F.2d 224 (4th Cir. 1975) ... 24

State v. *Luzzi*, 147 Conn. 40 (1959) 20

State v. *Moynahan*, 164 Conn. 560 (1973) 1

Stovall v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967) 26

United States v. *Agurs*, — U.S. —, 96 S.Ct. 2392 (1976) 14, 27, 29

United States v. *Bastone*, 526 F.2d 971 (7th Cir. 1975) 22, 23, 24

United States v. *Brawer*, 367 F. Supp. 156 (S.D.N.Y. 1973), *aff'd*, 496 F.2d 703 (2d Cir. 1974) 30

United States v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973) 33, 34

United States v. *Duhart*, 511 F.2d 7 (6th Cir. 1975) 25

United States ex rel. Fein v. *Deegan*, 410 F.2d 13 (2d Cir. 1969) 30, 31

United States v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975) 22, 23

United States v. *Harris*, 501 F.2d 1 (9th Cir. 1974) 24

PAGE

United States v. *Keough*, 391 F.2d 138 (2d Cir. 1968) 29, 30

United States v. *King*, 461 F.2d 53 (8th Cir. 1972) 34, 35

United States v. *Maloney*, 262 F.2d 535 (2d Cir. 1959) 33, 34, 35

United States v. *Marshall*, 526 F.2d 1349 (9th Cir. 1975) 22, 24

United States v. *Ruggiero*, 472 F.2d 599 (2d Cir. 1973) 28

United States v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967) 26

Williams v. *United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed. 2d 388 (1971) 26

United States Constitution:

Fifth Amendment 3, 31, 33

Sixth Amendment 3, 17, 26

Fourteenth Amendment 3, 18

Statutes:

28 U.S.C. § 1254 2

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,

Petitioner,

—v.—

PAUL MOYNAHAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John R. Manson, Commissioner of Corrections of the State of Connecticut, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit announced May 31, 1977, which judgment became final on July 14, 1977.

Opinions Below

The opinion of the United States District Court, District of Connecticut, is reported at 419 F. Supp. 1139 (D. Conn. 1976). The judgment of the District Court granting habeas relief was affirmed by the United States Court of Appeals, Second Circuit, without an opinion on May 31, 1977. The forty-three page decision of the Connecticut Supreme Court affirming the state conviction is reported as *State* v. *Moynahan*, 164 Conn. 560 (1973).

Jurisdiction

The Judgment of the United States Court of Appeals, Second Circuit, was entered on May 31, 1977. A timely Petition for Rehearing was denied on July 14, 1977, the effective date of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Questions Presented

I. Did the Court of Appeals err in holding that the right of confrontation under the Sixth and Fourteenth Amendments was abridged by the limitation of the cross-examination of a prosecution witness?

A. The *Davis* v. *Alaska* claim: Did the conduct of the state trial judge deprive petitioner of his constitutional right to confrontation?

B. Did respondent intentionally and voluntarily abandon the line of inquiry he now asserts he was not permitted to develop in his cross-examination of Edward Miller?

C. Should *Davis* v. *Alaska* be applied retrospectively?

II. Did the Court of Appeals err in holding that the state trial court violated *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny by failing to disclose to the defense information indicating, according to the District Court, that the police were at one time considering arresting a witness?

III. Did the Court of Appeals err in holding that the state trial court denied the petitioner his right to confrontation by allowing a witness to take the stand who reportedly might take the Fifth Amendment and who in fact did?

Constitutional Provisions Involved

U.S. Constitution, Amend. V, VI and XIV

Statement of Facts Material to Federal Question

Respondent was convicted in the Connecticut Superior Court of the crime of receiving stolen goods in violation of the then operative §§ 53-63 and 53-65 of the Connecticut General Statutes. On March 4, 1970, respondent, the deputy police superintendent of the Waterbury, Connecticut Police Department, was sentenced by that Court. In a 43 page decision announced on April 5, 1973, the Connecticut Supreme Court affirmed the conviction. 164 Conn. 560. After several actions concerning post-conviction relief in the state courts, respondent instituted the present action in the United States District Court for the District of Connecticut in November, 1973. The District Court granted the requested relief in a memorandum of decision filed on August 31, 1976 and its judgment filed on September 3, 1976. From that decision petitioner appealed to the United States Court of Appeals, Second Circuit, which affirmed on May 31, 1977.

The criminal trial in the state Superior Court, State of Connecticut, developed as follows. John Bishop, who was in jail awaiting sentencing on a charge of conspiracy to commit larceny, testified that on April 8, 1967, he broke into an appliance store in West Haven, Connecticut and took at least one television set. He went directly to the home of Charles Vernale, who "fenced" goods for him, and put the television in Vernale's garage. He returned a week later for payment; at that time he and Vernale delivered the set to the home of respondent, Paul Moynahan; he testified that this set was the one he had stolen. Bishop had previously seen the respondent at Vernale's house; the respondent had said that he didn't care what Bishop and Vernale did so long as they didn't do anything in Waterbury. Bishop testified that he had been told that the sentencing judge in his criminal case would be made aware of his testimony.

During cross-examination, copies of Bishop's statements to the police and to the investigative grand jury were ordered to be delivered to the defense. All of the prior statements of John Bishop were turned over to the defense.

There was testimony that a smashed television had been found in Plymouth, Connecticut on March 27, 1969. Evidence of a repair was found.

Edward Miller, a television repairman, testified on direct that he repaired the set at respondent's home on a Sunday in the summer of 1967. Miller had described the work to the police in February, 1969, and didn't see the set between 1967 and March, 1969. In March, Miller viewed the smashed set which had been found in Plymouth and verified that the repair was his. The entire direct examination of Miller consumed only twenty transcript pages.

The details of the direct examination of this witness were as follows: Miller testified that he had been employed for seventeen years as a television repairman and, on a summer Sunday morning in 1967, had repaired a Motorola 23 inch color T.V. set (Early American cabinet, maple finish) in the front sunroom of respondent's home. This witness described the nature of the repair in great detail: he repaired the set by opening a metal box in the chassis, removing the coil, soldering the broken wire, covering the wire with electrical tape to hold it in place and finishing the repair by soldering the metal box. The witness identified respondent as being present at the time he repaired the T.V. set. According to Miller, upon completion of the repair, respondent examined the set, expressed satisfaction and paid the witness a fifteen dollar repair.

Miller further testified that on three dates in February of 1969, he was interviewed by the Connecticut State Police regarding the repair he had made in 1967 at respondent's home. He described the set and he described for the police the full details of the repair stating how he had removed the metal cover of the interior box, soldered the wires of the coil, taped the wires, and then re-soldered the cover of the metal box in place.

Miller also testified that in April of 1969, the State Police took him to the Town Garage in Plymouth to examine a damaged T.V. set; he examined the set and told the officers it was the same set he had repaired at respondent's home in 1967. Miller informed the police that if they opened the soldered metal box, they would find the wire in the coil soldered and the black plastic tape he had used to cover the soldered wire. Miller testified he was present when the authorities removed the metal cover and he observed the wire in the coil which he had soldered and the black plastic tape which he had told the police would be visible on the interior coil.

At the commencement of Miller's cross-examination, respondent's counsel established that Miller had given three transcribed statements to the State Police and that he had testified before the one-man Grand Jury. Thereafter, in the absence of the jury, the trial court inquired as to the scope of respondent's cross-examination to which defense counsel responded: "We would seek to cross-examine Mr. Miller to establish a fixed motive in his mind which would be indicative of untruthfulness." The jury was recalled and cross-examination resumed with Miller stating that, prior to going to respondent's home, he had repaired other Motorola sets in 1967 and that his store also sold them.

On continued cross-examination, Miller testified as follows: he understood respondent had called him to make the repair since respondent's regular repairman was unavailable on Sunday; this was the only occasion on which Miller ever repaired any T.V. set in respondent's home; Miller had met respondent once before at the home of Charles Vernale who was a customer of Miller's store. When Miller was asked if Vernale was a customer in 1967, the jury was excused so the State's objection to this line of inquiry could be considered by the court. Respondent argued that his purpose in developing cross-examination "along these lines is merely for the purpose of possible erroneous identification or exposure to the set at other places." Defense counsel further stated: "In other words if he [Miller] were having transactions with Mr. Vernale with respect to repair work or, frankly, . . . acquisition of sets, from him, this raises in my mind that we are placing the man in a position where the man had business dealings with the man whom the State, through its witnesses, has identified as being a person who had possession of this set." Thereafter, the following colloquy occurred between the Court and the prosecutor:

> Mr. Gaffney: Now, Mr. Hennessey says this is the line of questioning that he wants to get

> here. Why doesn't he get this right away? He can just ask the man: Did you ever repair this set at Mr. Vernale's house? It is that simple.
>
> The Court: Mr. Gaffney, he has a right, as counsel, as you well know, to develop testimony in his own way. The Court has no right to restrict him unreasonably, so that I will allow these questions.
>
> * * * * *
>
> The Court: Gentlemen, I would ask you this, to bear in mind the fact that we do have to discuss these matters in the absence of the jury. In the interest of saving time, and I believe both of you are experienced trial counsel and know the rules of evidence, and I ask you to adhere to the rules so that it will not be necessary to continuously excuse the jury.
>
> However, I am not going to unduly restrict either one of you. I believe that these are questions which are proper on cross-examination, and I will allow them.
>
> Mr. Gaffney: May I have an exception?
>
> The Court: Exception may be noted.
>
> The Court: We will take the morning recess at this time.

When the jury returned, Miller was permitted to testify, over the State's objection to each question, as follows: he went to Vernale's house about three times in 1967, once to repair an antenna, once to repair a radio and phonograph, and once to repair a 21 inch Zenith console; in 1967, at Vernale's request, he repaired two other color T.V.'s, a Magnavox and an Admiral. After 1967, Miller testified he did not see Vernale very much: "I hadn't seen him at all after that period of time." Defense counsel next asked: "Now, during the period of 1967, did you sell any color television sets which you

obtained from Mr. Vernale?" The State again objected and the following appears on the record:

> The Court: What is the purpose of this question, Mr. Hennessey?
>
> Mr. Hennessey: I am seeking to determine whether or not a mistake might not have occurred, that could it not have been possible for this gentleman to have obtained a set which he resold which might have been this set which the State has sought to place in Mr. Vernale's possession.
>
> The Court: The objection is overruled. An exception may be noted.

The witness answered the question in the affirmative; when asked how many sets, the trial court again overruled the State's objection and Miller answered: "There were two." Next, the defense inquired as to the identity of persons to whom the two sets were sold; when the State objected, the court stated: "This is cross-examination. Proper latitude is allowable. I will allow it." Miller testified the two sets were sold to a Mr. Stevens and a Mrs. Gasparri. Respondent then asked the witness whether, in 1968, he had sold any color television sets obtained from Vernale; Miller answered "No." Respondent then inquired: "Do you have in your records any documents relating to the purchase of those color television sets?" The State objected and the following transpired:

> The Court: What is the purpose of this question, Mr. Hennessey?
>
> Mr. Hennessey: Well, I am seeking to determine again, your Honor, whether or not this man may have other documents or information in his possession which would be of assistance to me with respect to the question of identification.

> Mr. Gaffney: Identification of what, this particular set? I don't follow his reasoning, your Honor. We have talked about all the other sets except this particular set.
>
> Mr. Hennessey: Could I be heard on that, if your Honor pleases?
>
> On repeated occasions Mr. Gaffney has sought to limit me to this set. I think it is obvious, your Honor, what our defense is, and I don't think that our case rests solely on this set.
>
> Mr. Gaffney: If the Court pleases, the defendant's case is not before the Court. The State's case is before the Court, and the State's case is based on this set and this man has testified as a State's witness on direct examination. His examination was limited to this particular set, and I submit it should be limited to that scope.
>
> The Court: I think the last question is remote, Mr. Hennessey. I will sustain the objection to the last question.

Miller's brief direct examination was conducted during the course of the court day on January 20, 1970; it consumed only twenty-two pages (22) of transcript. Cross-examination of Miller commenced January 20, 1970 and continued through January 21st; cross-examination of this witness consumed one hundred eighty-seven pages (187) of transcript. During the morning of January 21, Miller was further cross-examined in great detail and at great length concerning the nature of the repair he performed at respondent's home and claimed inconsistencies between his testimony and prior statements to the police. When the Court recessed at 1:00 P.M. for lunch, Miller was still being cross-examined; prior to recalling him to the stand when court reconvened after lunch, defense counsel advised the court: "we are going to bring Mr. Miller back and I hopefully request that I be able to

ask those questions in the absence of the jury which may cause some concern." The court agreed to the so-called "dry run" and, in the absence of the jury, the judge overruled the State's objections to all but three of the questions. *The defense never undertook to ask the non-objectionable dry run questions (where the State's objections were overruled) again in the presence of the jury. The reason is obvious considering the answers Miller gave to those questions.*

In the dry run, Miller testified that when he received the two television sets from Vernale which he subsequently sold to Gasparri and Stevens, he did not know they were stolen; that when he was first questioned by the police he was not told he was under investigation for anything; that no one made any promise to him as to what might occur if he testified; that there were no conversations about promises; that at no time was he apprehensive about the questioning; that he told the police he would be willing to cooperate; that he was questioned about the respondent's transaction and several others; that at no time during these questionings was there any suggestion that he was under investigation; that in his own mind he did not think he was under investigation; that no one ever said or suggested to him what would happen if he did not cooperate; that no promises or threats were made to him about the Stevens and Gasparri matters, nor, at any time did he feel that he was under investigation for any of these; that he kept no books or records of those transactions.

The trial court sustained the State's objections only to the following three questions: "At any subsequent inquiry were you told by any member of the police or any member of the State's Attorney's office that you were under investigation?"; "How much was paid to Vernale for the two sets?"; "Whether he received invoices when he received the sets from Vernale?" The entire dry-run

consisted of a total of thirty-six questions; the State's objections were overruled by an experienced state trial judge on all but the last three questions. On that record, the District Court granted federal habeas relief on the ground that the trial judge had improperly restricted cross-examination and entered a finding of a constitutional abridgement on the basis of *Davis* v. *Alaska, infra;* the Court of Appeals, Second Circuit, affirmed without an opinion.

After the completion of the "dry-run," respondent's attorney said "Well, I didn't want to ask the question in their [jury's] presence." The court had suggested that those questions to which objections had been sustained be omitted from the reporter's reading. The state objected to the idea of a non-adversary interrogation before the jury whereupon respondent's attorney announced "I won't go into this line of inquiry at all." To this, the trial judge replied: "Then that solves the whole problem." Accordingly, the Connecticut Supreme Court ruled that the defense had strategically *abandoned* this line of inquiry. Considering counsel's statement, the reaction of the trial judge, and the answers the witness had given to the questions asked by the defense, this was a perfectly sound and reasonable conclusion.

As stated, when the jury returned, respondent continued and, subsequently, completed his cross-examination of Miller. *At no time were any of the dry-run questions or other questions asked of this witness relating to any bias or prejudice.*

Against this testimonial background, the United States District Court held, *approximately six and one-half years after respondent's conviction and over three and one-half years after the affirmance of the conviction by the Connecticut Supreme Court,* that an experienced state trial judge impermissibly restricted the cross-examination of this witness in violation of the constitu-

tional mandate of *Davis* v. *Alaska, infra. It took the District Court three years from the filing of the habeas petition to arrive at this decision.*

The District Court also held a comment made by the police in the course of the questioning of Edward Miller on February 18, 1969 was exculpatory, apparently on the basis that the comment suggested that Miller had originally been a potential target of the investigation. *There had been no requests for any statements prior to trial.* During his direct testimony, Miller had stated he had been interviewed by the Connecticut State Police early in the investigation. At the commencement of his cross-examination, the defense moved for the production of all of Miller's prior statements. At that point there was extensive discussion concerning the proposed scope of the cross-examination. The resulting order does not appear in the trial transcript; however, the state court finding in the record before the Connecticut Supreme Court indicates that the trial judge ordered the prosecution to turn over "any matter which might be of assistance to the accused."

An examination of Edward Miller's statements to the police of February 17, 18, and 21, 1969, and of his Grand Jury testimony clearly shows the rationale on which certain portions of the February 18th statement were selected for disclosure. In general, the portions of that statement dealing with the Moynahan transaction were disclosed; the portions of the statement dealing with other persons were not. The undisclosed portion of the statement which the District Court held to be fatal is set forth in footnote #20 of that Court's opinion. (Appendix to this Petition, pp. 22a-23a); in essence, it amounts to one sentence (seventeen words) out of a statement running some sixty-five pages in length: "square away Ed Miller . . . Otherwise, we're going to have to start looking at Ed Miller a little stronger."

The above statement was introductory and succeeded the interview of the previous day following which the police authorities were dissatisfied with the material furnished by Miller. Essentially, the February 18th interview was conducted in the following setting. On the previous day Miller had told them that he had sold two sets that he had received from Vernale. The police were obviously trying to develop information about other sets. They told Miller that they were looking for the truth, that they already knew that he had handled two sets that were stolen, and they thought he may have handled more. They said they were going to find out the truth with or without Miller's help, but they preferred his help. Significantly, Miller stuck to the same story he had told the day before and would repeat again: he had received only two sets from Vernale. Thus, he told the same story regardless of the pressure applied; similarly, his testimony at trial was consistent with these statements.

An examination of the statement of Edward Miller on February 21, 1969, is perhaps even more revealing. The police more or less accused Miller of selling two more sets, but Miller adhered to his original statement. This statement was disclosed to the respondent.

During cross-examination, in the context of the identity of the repair, Miller was asked by the defense whether ". . . the State Police made inquiry of you with respect to this transa tion." The answer was in the affirmative. The three statements and the Grand Jury testimony were used by the defense in an effort to discredit Miller's recollection that the repair was made at the respondent's home. Using the statements, the defense was able to bring out some initial difficulty on Miller's part in remembering the make of the set which he had repaired for the respondent. Thereafter, the statements were used by defense counsel to tie Miller to Vernale and the jury heard from a reading of the statements, the

admonition by Sgt. Courtney (Conn. State Police) to Miller: "Come clean with me on Moynahan."

Again using the statements for purposes of cross-examining Edward Miller, the defense elicited that he had told the police that he had sold two other sets he had received from Vernale, and, that at one time Miller had stated, and later retracted, that he had sold a third Vernale set. Additionally, the state trial judge admitted into evidence the statements of the police interviews as prior inconsistent statements. Thus, the jury had all this before it and one must question how the quoted seventeen words conceivably could have been used by the defense "to give rise to a reasonable doubt that did not otherwise exist."

Nevertheless, the United States District Court held that even though substantial portions of the Miller statement were delivered to and used by respondent at trial, the state withheld exculpatory evidence. The state argued that respondent already knew of the extent of Miller's alleged criminal involvement and, in any event, whatever possibly exculpating material was not disclosed, did not meet the standard enunciated in *United States* v. *Agurs*, *infra*.

Although it appears that the District Court judgment (affirmed by the Court of Appeals, Second Circuit) awarded habeas relief principally on the basis of the *Davis* v. *Alaska*, *infra*, and *Brady* v. *Maryland*, *infra*, respondent also raised an issue of confrontation under *Namet* v. *United States*, *infra*. The facts underlying this claim are as follows: when the state announced its intention to call Charles Vernale, a longtime acquaintance and friend of the respondent, the attorney for the respondent announced that since the witness was then facing charges arising out of the same transaction, it was *his* belief that Vernale would refuse to testify by invoking the Fifth Amendment. On the basis of this belief, respondent objected to the examination of Vernale before the jury without first having a dry-run to determine what the witness's intentions were. The Court overruled the objection and motion for a dry-run.

These additional facts pertaining to the state's calling of Vernale should be noted: While Vernale was represented during the proceeding by a court-appointed attorney, the attorney's only statement of record regarding Vernale's testifying concerned his physical ability to take the stand. There is no record of either the Court or the state being informed of Vernale's intentions regarding the Fifth Amendment. Additionally, it was the State's representation that it had no notice of Vernale's intent to refuse to testify. It was the State's understanding that, on several occasions, Vernale had knowingly waived his Fifth Amendment rights and had testified under oath.

On direct examination of Vernale, after several preliminary questions, in answer to each of which Vernale answered that he and respondent were friends, the following occurred:

> Q. And tell the ladies and gentlemen of the jury something about your friendship. What did it involve or entail, for example?
>
> A. I would like to take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not my trial.
>
> Q. All right. Were you ever an informant for Mr. Moynahan?
>
> A. Never. I was never an informer.
>
> Q. Did you ever give him any information of any kind concerning criminal activities?
>
> A. I take the Fifth Amendment on that. I don't want to incriminate myself in any way, also.

Q. Did you ever make a gift of a television set, a color television set, to Mr. Moynahan?

A. I take the Fifth Amendment on that. I don't want to incriminate myself.

The state asked no further questions of the witness. On cross-examination, Vernale testified to his relationship with the respondent until the questioning reached the subject of television sets at which time he once again took the Fifth Amendment. Cross-examination then ceased and the witness was excused.

The state brought up the fact of Vernale's refusing to testify, only at one other point, in the trial. In rebuttal argument, in response to the defendant's attacks on the credibility of the State's witnesses, the prosecution stated briefly:

> And Charles Vernale, who was asked, 'Did you give the defendant, Paul Moynahan, a color television set? Did you deliver it to him?' And he took the Fifth Amendment. He is not a very great guy.

At no point did the state argue or request that any inference should be drawn against the respondent as a result of Vernale's refusal to testify.

Finally, the Court, in its charge to the jury, after repeating the questions which underlie respondent's claim here, gave the following curative instruction to the jury:

> Under our Constitution Mr. Charles Vernale had the right to refuse to answer those questions on the ground of self-incrimination. [C]onsequently, you are now instructed that no inferences should be drawn by you as to what the answers might have been. And, of course, you are not to draw

> any adverse inferences against Mr. Paul Moynahan by reason of the fact that Charles Vernale refused to answer the questions on Constitutional grounds or, for that matter, on any other grounds.

Reasons for Granting the Writ

Review of the decision below by this Court is necessary and appropriate for the following reasons: (1) the affirmance below is a misapplication and misinterpretation of the constitutional dictate of *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974); (2) the decision is inconsistent with previous decisions of the Court of Appeals, Second Circuit, and with the decisions of Courts of Appeals in other Circuits; (3) the case involves constitutional questions of exceptional importance in that the lower court's broad and expansive interpretation of *Davis* v. *Alaska*, *supra*, and its retrospective application, has opened the floodgate to an onslaught of habeas petitions and proceedings brought by state prisoners; (4) the affirmance below is inconsistent and inconsonant with the teaching of *United States* v. *Agurs*, — U.S. —, 96 S.Ct. 2392 (1976); (5) the affirmance below represents a misapplication of this Court's decision in *Namet* v. *United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed. 2d 278 (1963); and (6) the case involves questions of constitutional mandate and application which are extremely important and critical to law enforcement and prosecutorial personnel in the state of Connecticut and these questions should be addressed and analyzed in an opinion of an appellate court.

I.

The Sixth Amendment guarantees the right of a defendant in a criminal case "to be confronted with the witnesses against him" and this basic right is secured

for defendants in state prosecutions through the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). Quite obviously, the very essence of the right protected by the confrontation clause is the right to adequately and effectively cross-examine prosecution witnesses. *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966); *Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed. 2d 934 (1965). Included in the constitutionally protected right of confrontation is the cross-examiner's entitlement to expose bias, prejudice, and/or improper motivation on the part of a given prosecution witness since such considerations are relevant in weighing the credibility of the witness's testimony. *Davis* v. *Alaska*, *supra*; *Green* v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959); *Alford* v. *United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

The District Court's reliance (adopted by the Court of Appeals, Second Circuit) on *Davis* v. *Alaska* was misplaced. In *Davis*, a "crucial" prosecution witness (person who identified the defendant) was on probation as a result of a juvenile court adjudication; under Alaska law, such probationary status was entitled to complete confidentiality and, although readily known about by defense counsel, could not be revealed through cross-examination. Following affirmance of Davis' conviction by the Alaska Supreme Court, certiorari was granted by this Court to consider only:

> whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent when such impeachment would conflict

> with the State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. *Davis* v. *Alaska*, 415 U.S., *supra* at p. 309.

This Court reversed the Alaska court stating: "*In this setting* we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness and his family] by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (Emphasis added). *Davis* v. *Alaska*, 415 U.S. *supra* at p. 319. In a separate opinion, Mr. Justice Stewart concurred with the majority holding "in the circumstances of this case." *Davis* v. *Alaska*, 415 U.S. *supra* at p. 321.

More specifically, Davis had been convicted of grand larceny and burglary in regards to the theft of a two foot square safe from a bar known as the Polar Bar in Anchorage. Richard Green was the crucial witness for the prosecution. He had a juvenile record stemming from burglary of two cabins and at the time of Davis' trial was on probation. A protective order was entered prior to the testimony prohibiting any reference to Green's juvenile record by the defense in the course of cross-examination. Chief Justice Burger's opinion, quoting from the trial transcript a portion of Green's cross-examination, emphasized the fact that the protective order effectively left unchallenged Green's "protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogations." Citing the fact that the confrontation clause includes the right to a *meaningful* cross-examination, this Court concluded:

> As in Alford, we conclude that the State's desire that Green fulfill his public duty to testify freely

from embarrassment and with his reputation unblemished must fall with the right of petitioner to seek out the truth in the process of defending himself. *Davis* v. *Alaska*, 415 U.S., *supra* at p. 320.

The tenor of the *Davis* decision is a balancing of the state's desire to maintain the secrecy of juvenile records and the right of a defendant to effectively confront and cross-examine the key witness against him. This Court quite reasonably struck the balance at a point where the witness was permitted to use the protective order to commit perjury. Cf. *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). Here, the lower court's unwarranted and very expansive interpretation of the constitutional rule established by *Davis* amounts to an unfortunate example of an experienced state trial judge being "second-guessed" by a federal court on routine evidentiary rulings made many years ago during the course of state criminal litigation.

The right to cross-examination for purposes of establishing witness bias, prejudice, special interest, and/or improper motive is well-established in Connecticut law. *State* v. *Luzzi*, 147 Conn. 40 (1959); *Atwood* v. *Welton*, 7 Conn. 66 (1828). Similarly, it has long been recognized that the scope of cross-examination is matter properly and necessarily within the sound discretion of the trial judge and rulings in this regard are to be overturned only upon a clear showing of abuse. *State* v. *Luzzi*, *supra*. In the instant case, by granting the writ, the District Court determined, *on this record*, that the state trial judge not only abused his discretion, but that such abuse was of constitutional magnitude. Petitioner contends that this conclusion finds no support in either the record or in existing legal precedent.

Here, Respondent was permitted to cross-examine Miller about repairs he had made at the request of Ver-

nale, about his business relationship (in 1967) with Vernale, and about the two sets he had obtained from Vernale and later sold. Thus, the state trial judge, over the State's objections, permitted cross-examination into the witness' business dealings with Vernale, and, to the extent that these demonstrated questionable motivation deriving from possible criminal complicity, the details were fully before the jury. Additionally, had Respondent so chosen, he could have asked those "dry-run" questions to which objections were not sustained when the jury returned. His reason for not choosing to do so is apparent on the basis of the answers he received to those questions when they were propounded outside the jury's presence. Only when the cross-examination became clearly repetitious (were you told that you were under investigation? —witness had already testified that he did not believe he was under investigation) and far afield (what he paid Vernale for the two sets, and, whether he had invoices from Vernale) did the trial judge sustain the State's objections to this line of cross-examination.

The District Court held that continued cross-examination of Miller would have established that he "was vulnerable to pressure from the police and prosecutors" and was forced "to alter or color his testimony." Such contention overlooks the *peculiar nature of Miller's testimony* which, in itself, rendered the testimony manifestly reliable. This witness testified that in February of 1969 he furnished the police with information concerning the repair he had made in 1967 to the set in Respondent's home. He described for the police all the details of the repair: the removal of the metal cover from the metal box that housed the sound coil, the soldering of the wire on the sound coil, the taping of the wire, the re-soldering of the metal cover to the box. A few months later, when the police recovered the set a few miles from Respondent's home, Miller testified he was present when the set was examined; the police removed the metal cover to the box and found exactly

what Miller had stated they would find; the re-soldered metal cover, the blacktape, and the soldered wire. *This evidence, by its own nature, was extremely reliable; regardless of how much additional cross-examination the trial judge allowed concerning Miller's motive in testifying, it could not have affected the inherent reliability of this important testimony.* Thus, unlike the situation in *Davis*, there was absolutely no reason here to believe that Miller had testified perjuriously.

Here, the record reveals that the state trial judge permitted a lengthy and searching cross-examination of Miller. In the exercise of his discretion, the trial judge properly assumed that further cross-examination into the witness' subjective thoughts would not be meaningful considering the inherent reliabiliy of Miller's testimony, and, the extent to which his business relationship with Vernale had already been developed. *United States* v. *Bastone*, 526 F.2d 971 (7th Cir. 1975); *United States* v. *Marshall*, 526 F.2d 1349 (9th Cir. 1975).

II.

To the extent that the Court below rejected the traditional concept that the proper scope of cross-examination rests within the informed discretion of the trial judge, the affirmance is inconsistent with the previous decision of the Second Circuit in *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975). In *Finkelstein*, the Court of Appeals had occasion to evaluate a *Davis* claim very similar to the one presented here (witness' improper motive stemming from Government's promise not to prosecute in exchange for witness' testimony). Although the federal trial judge had repeatedly sustained the Government's objections to the defendant's attempts to examine the prosecution witness concerning the existence of Government promises, the Second Circuit affirmed the conviction and distinguished *Davis* stating:

> In *Davis*, the witness' probationary status suggested a possibility that he conferred with the police prior to taking the stand. *The witness' denial of such conversations appeared to be of questionable truthfulness*, and *serious* damage to the prosecution's case would have been a *real* possibility if further cross-examination had been permitted. (Emphasis added). *United States* v. *Finkelstein*, *supra* at p. 529.

In this case, there was absolutely no basis for reasonably concluding that Miller's testimony was probably perjurious. Furthermore, based on Miller's answers to the questions propounded during the "dry-run," it is apparent that no *serious* damage would have resulted to the State's case even had the trial judge seen fit to have allowed the cross-examination to continue ad infinitum. Thus, the affirmance of the District Court opinion here is inconsistent with the Second Circuit's previous decision in *United States* v. *Finkelstein, supra.*

In the *Finkelstein* case, Judge Moore properly recognized that the mere mentioning of the word *Davis* does not eliminate the traditional discretion of the trial court in determining relevance of cross-examination. In *Davis*, highly relevant evidence was excluded because of a state statute; here, the ruling was based solely on relevance.

Other Circuits have struggled with questions raised by this Court's decision in *Davis* and have arrived at seemingly inconsistent holdings. In the Seventh Circuit, the Court of Appeals, in *United States* v. *Bastone*, 526 F.2d 971 (7th Cir. 1975), viewed the *Davis* mandate as considerably more limited than here and acknowledged that a constitutional infringement did not result from every curtailment of cross-examination (regarding possible bias, improper motive, etc.) following an otherwise lengthy and searching defense questioning of a state wit-

ness. Also, in *Bastone*, the Seventh Circuit reconized that abandonment of this area of cross-examination, such as existed in the instant case, rendered meritless any argument the trial court erroneously limited cross-examination.

The Ninth Circuit has held that thorough and extensive cross-examination of a state witness (as existed in the instant case) renders continued examination on bias and/or prejudice of marginal relevance and, thus, when reasonably restricted, not violative of *Davis*. *United States* v. *Marshall*, 526 F.2d 1349 (9th Cir. 1975). In another post-*Davis* decision, *United States* v. *Harris*, 501 F.2d 1 (9th Cir. 1974), the Ninth Circuit divided on the questions of the extent to which *Davis* affects, or constitutionally limits, the discretion of the trial court in reasonably controlling the range of cross-examination on bias, motive, etc.

In a case involving collateral attack by a state prisoner in a federal District Court, the Fourth Circuit affirmed a denial of habeas relief even where the state trial judge refused to allow the defense to inquire concerning previous, perjurious testimony by the state witness. *Snyder* v. *Coiner*, 510 F.2d 224 (4th Cir. 1975). In *Snyder*, the state trial court had conducted a "dry run" very similar to the present case and then refused to permit such cross-examination in the presence of the jury. Both the District Court and the Court of Appeals found no violation of the *Davis* principle and stated that the determination regarding the scope of cross-examination properly rested with the state trial judge. On the other hand, on a § 2255 motion brought by a federal convict, the Sixth Circuit ruled that the *Davis* mandate was violated where the federal trial judge precluded the defense from cross-examining a Government witness on previous arrests and convictions and as to whether the witness was "under the shadow of some suspicion and asking somebody to ease up the pressure on him;" however, the

Sixth Circuit held that any error regarding such limitations on cross-examination was harmless and affirmed the District Court's denial of the motion. *United States* v. *Duhart*, 511 F.2d 7 (6th Cir. 1975). Despite the views expressed in the Fourth and Sixth Circuits, the Fifth, in a case arising on direct appeal, held that the lower court's refusal to permit cross-examination on prior arrests and convictions left the jury with the impression that the witness was invulnerable to "pressures by the prosecution" and thus, under *Davis*, required reversal of the conviction.

As indicated, the various federal Circuits are "all over the lot" with regard to the scope and application of this Court's teaching in *Davis;* it is respectfully urged that state law enforcement, prosecutorial, and judicial personnel are entitled to guidance and clarification concerning the extent to which the Sixth Amendment principle enunciated in *Davis* is limited to the unusual factual circumstances of that case. Here, the decision below renders the application of the *Davis* principle limitless and, thus, opens the door for collateral attack any time a state trial judge, in his or her discretion, places *any* restriction on cross-examination aimed at developing bias, improper motive, etc. Therefore, the decision below provides no guidance or clarification regarding this issue; realistically, the decisions from the other Circuits, because of their diverse holdings and infinite range of factual distinctions, also offer no such guidance or clarification.

III.

Respondent's conviction became final when it was affirmed by the Connecticut Supreme Court on April 5, 1973. The petition for federal habeas relief was filed in the United States District Court at Hartford, on November 5, 1973. The United States Supreme Court decided *Davis* v. *Alaska*, *supra*, February 27, 1974.

In *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed 2d 1199 (1967), this Court stated: "The retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based;" rather, the guiding criteria are: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard.

In determining whether this Court's proclamations of constitutional principle are to be given retrospective application, it has been stated: "Where the major purpose of new constitutional doctrine is to overcome an aspect of the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule should be given complete retroactive effect." *Williams* v. *United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed. 2d 388 (1971). However, in *Stovall*, this Court declined to give retroactive effect to *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967), and, *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967), although the Sixth Amendment principle expounded in those cases was "aimed at avoiding unfairness of the trial by enhancing the reliability of the fact-finding process in the area of identification evidence." *Stovall* v. *Denno*, 388 U.S. *supra*, at p. 298.

While recognizing that any judicial decision dealing with matters related to cross-examination of witnesses can be said to concern possible "impediment of the truth-finding function," and may place in question the accuracy of previous guilty verdicts, petitioner nevertheless contends that *Davis* should not have given retrospective application in the instant case. Extended to its very broadest interpretation (as in the District Court's Memo-

randum of Opinion), *Davis* v. *Alaska* gives rise to a constitutional issue any time there is *any* restriction of cross-examination of a prosecution witness in the area of bias, interest, motive, etc. To the extent that this very broad interpretation of the District Court is correct, *Davis* represents a new rule of constitutional law which abrogates the heretofore relied upon principle of trial court discretion. Undoubtedly, the issue will now be raised (and has been) on federal habeas whenever a state trial judge limits inquiry into any collateral matters which imaginative counsel can somehow tie into a claim of witness bias, motive, etc. The affirmance in the present case has had the effect of opening wide the floodgates for innumerable habeas petitions in both the state and federal courts grounded on *Davis* claims. This will result in an additional burden on the federal courts and present an unnecessary and undesirable threat of greatly increased federal review of mere *evidentiary rulings* by state judges. Cf. *Schaefer* v. *Leone*, 443 F.2d 182, 185 (2d Cir. 1971). Such clearly was not the intention of Chief Justice Burger in *Davis*.

IV.

The affirmance below constitutes a misapplication of this Court's recent decision dealing with exculpatory evidence: *United States* v. *Agurs*, — U.S. —, 96 S.Ct. 2392 (1976). There, Justice Stevens reviewed the three categories of cases covered by *Brady* v. *Maryland*, 373 U.S. 83 (1963). One is the knowing use of perjured testimony. The second is the failure to produce evidence that would be material in the sense that it might affect the outcome of the trial despite a specific request for production. The third situation is that in which no specific request is made, but the obvious exculpatory nature of the evidence should alert the prosecutor to the duty to disclose. *United States* v. *Agurs*, *supra*, 2398, 99.

"The heart of the holding in *Brady* is the prosecution's suppression of evidence. . ." *Moore* v. *Illinois*, 408 U.S. 786, 794 (1972). "[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense." *Giles* v. *Maryland*, 386 U.S. 66, 96 (1967) (White, *J.*, concurring). "The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him." *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir. 1973).

Here, it is absolutely clear that the defense was aware of Miller's possible complicity. In the course of requesting the prior statement, counsel for the defense said, "We know from our own investigation of three instances where Mr. Miller sold color television sets to individuals in the Waterbury area, Mr. Stevens, Mr. Gaspari, and Mr. Lanza. It is our understanding as well that one of these gentlemen, at least, was subsequently charged by the State's Attorney's Office with the crime of receiving stolen goods, based upon the fact that he did receive a stolen color T.V. set from Mr. Miller. However, to the best of our knowledge, Mr. Miller was not charged, although he, in fact, was the seller. . ." Thus, a serious contention that the defense had no idea that the police may have said that they may have to take a look at Ed Miller is incredible.

Although the defense may not have known the precise seventeen words used by the police on February 18, it is clear that they knew Miller's situation. They knew that Miller had been interrogated three times by the police and again in the grand jury. *They knew and developed in cross-examination* that Miller had received two television sets from Vernale, and that at least one of the recipients

of the sets had been arrested for receiving stolen goods. "This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court. . ." *Giles* v. *Maryland*, *supra*, 98 (Fortas, *J.*, concurring).

In *United States* v. *Agurs*, *supra*, the traditional balancing between the good or bad faith of the prosecutor and the materiality of the evidence was rejected. Cf. *United States* v. *Keough*, 391 F.2d 138 (2nd Cir. 1968). Instead, the sole issue to be considered is *the character of the evidence*. *United States* v. *Agurs*, *supra*, 2400. Materiality in the *Brady* context may be deemed to be the effect that the evidence would have had if it had been disclosed. "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record." *United States* v. *Agurs*, *supra*, 2401-02.

The impact that the addition of the precise seventeen words used by the police at one point during the February 18 interview of Miller would have had on the jury verdict is, at best, obviously minimal. The jury knew that the police were looking at Ed Miller: three interviews and a grand jury appearance constitute more than casual interest. The jury knew that Miller had sold at least two other sets which he had obtained from Vernale, and that the police had questioned him rather closely about those sets. They knew that there was some association between Miller and Vernale. They knew that the police had advised Miller to "come clean" with them on Moynahan. They knew that the sales of the two sets had not been recorded.

Since the jury in the instant case knew of Miller's possible criminal involvement and of the tenor of his

examination by the police, the addition of the "withheld" testimony would not have created any reasonable doubt not otherwise entertained. See also *United States* v. *Brawer*, 367 F. Supp. 156, 170, 172 (S.D.N.Y. 1973); aff'd, 496 F.2d 703 (2d Cir. 1974); *United States ex rel Fein* v. *Deegan*, 410 F.2d 13 (2d Cir. 1969).

The District Court (and apparently the Court of Appeals) concluded that the undisclosed 17 words "in [its] estimation, gave rise to a reasonable doubt as to petitioner's guilt," and, therefore, "that he was deprived of due process" by the non-disclosure. Neither court discussed how the statement of the investigating police officer: "square away Ed Miller. . . Otherwise, we're going to have to start looking at Ed Miller a little stronger," could have been used by the defense to create a reasonable doubt which did not otherwise exist. It is submitted that defense counsel could have accomplished nothing more even had he had in his possession these precise words used by the investigating officer. At best, he could have simply framed a question to Miller as to whether the police had, in fact, made the quoted statement to him during the February 18 interview. It is inconceivable how that alone would have created a reasonable doubt, particularly since the substance thereof was already before the jury, and, considering the answers given by Miller on the "dry run."

Thus, it is contended that the utilization of the precise 17 words by the defense would be, at best, merely cumulative, and, that any effect it might have on the jury which would be beneficial to the accused is extremely and extraordinarily speculative. This affirmance by the Court of Appeals on this record decrees due process requirements far beyond the traditional concepts of fairness and well into the realm of absolute perfection in the trial of criminal cases. Such is inconsistent with Judge Friendly's learned analysis in *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968) and overlooks the applicability of the following language, previously used by the Second Circuit, to the instant case:

> The [state] prosecutor made many disclosures to the defense and there is nothing in the record which suggests that his conduct as well as that of his staff, *under difficult circumstances* did not amply satisfy *the fundamental concepts of due process necessary in order to provide the defendant with a fair trial.* (Emphasis added). *United States ex rel Fein* v. *Deegan, supra*, at p. 20.

V.

The issue of the propriety of a prosecutor's calling a witness and thereby compelling him to invoke the Fifth Amendment in the presence of the jury is governed by *Namet* v. *United States*, 373 U.S. 179 (1963). That case, together with the more recent cases of *Douglas* v. *Alabama*, 380 U.S. 415 (1965) and *Frazier* v. *Cupp*, 394 U.S. 731 (1969), sets out the general rule that the practice of compelling a witness to invoke his Fifth Amendment rights can require reversal in two circumstances (a) when it amounts to prosecutorial misconduct; for example where the prosecutor, having full knowledge of the witness' intentions, calls him to the stand simply to put the claim of privilege, with its attendant inference against the defendants, before the jury; and (b) where, regardless of prosecutorial misconduct, the claim of privilege has added critical weight to the state's case by putting inferential matter before the jury which the defense had no way of cross-examining.

Petitioner does not challenge the rule enunciated in the *Namet* line of decisions; however, it is respectfully urged that an application of the rule to the facts of the instant case establishes no reversible error in the testimony of Charles Vernale and the circumstances surrounding such testimony. As stated in *Namet*, none of the

several decisions dealing with this question suggests that reversible error is invariably committed wherever a witness claims his privilege not to answer. Rather the courts have looked to the surrounding circumstances in each case.

While it has been stated that the good or bad faith of the prosecutor is not controlling in a *Namet* claim, *Frazier* v. *Cupp, supra,* 736, nevertheless the record here precludes any claim of prosecutorial misconduct. In determining whether misconduct has been established, the courts have considered several factors: the prosecutor's improper intent in calling the witness; his advance knowledge of the witness' intentions; whether the prosecutor continued to examine the witness at length once the privilege had been claimed; whether any reference to the testimony was made in closing argument. A review of the cases indicates that only where a combination of at least two of the above factors exists, has misconduct been found.

The State here had a bona fide purpose in calling Vernale to testify. On the one hand, its failure to do so could have given rise to an unfavorable inference resulting from a missing witness charge. *Queen* v. *Gagliola,* 162 Conn. 164, 168 (1972). On the other hand, the witness had given statements under oath three times previously, once to a grand jury and twice to the police and had never before refused to testify. There was certainly no reason to suspect that he had changed his mind about testifying; the only indication thereof was the respondent's stated belief that Vernale would invoke the Fifth Amendment. But the prosecuting authority can't be required to "accept at face value every asserted claim of privilege." *Namet* v. *United States, supra,* 188. Here there can be no question but that the State, in good faih, expected Vernale to testify. Consequently, the State's calling of the witness cannot be deemed prosecutorial misconduct. *Frazier* v. *Cupp, supra,* 736-737.

While the manner in which the State examines the witness may also constitute prosecutorial misconduct, a review of the cases shows that such a finding has been made only where the prosecution has grossly overreached all sense of propriety. Surely the asking of but three questions in the instant case did not amount to the degree of abuse found in such cases as *Douglas* v. *Alabama, supra* (an entire confession read in with the witness, after every few sentences, refusing to answer the prosecutor's question as to whether he made the statement embodied in those sentences); or *United States* v. *Coppola,* 479 F.2d 1153 (10th Cir. 1973) (prosecutor asking a series of eighteen questions and witness pleading the Fifth Amendment to each); or *United States* v. *Maloney,* 262 F.2d 535 (2d Cir. 1959), (prosecution calling, in series, three witnesses all of whom refused to testify and having advance knowledge of the intentions of the first two). The present case falls among those cases where examination had ceased alomst immediately upon the witness' asserting his Fifth Amendment rights. *Frazier* v. *Cupp, supra,* 734; *Gerberding* v. *United States,* 471 F.2d 55 (8th Cir. 1973); and *Cota* v. *Eyman,* 453 F.2d 691 (9th Cir. 1971).

The final factor that may contribute to a finding of prosecutorial misconduct is where the prosecution, in closing argument, directs the jury's attention to the witness' claim of privilege. In the instant case, the State in rebuttal argument, made mention of Vernale's refusal to testify but did so only briefly and made no effort to have the jury draw any inference from the fact. While prosecutorial misconduct has been found where the State commented on a witness' claim of privilege, there have always been additional factors contributing to the finding: *Cain* v. *Cupp,* 442 F.2d 356 (9th Cir. 1971) (the prosecutor had been informed by the witness' attorney of his client's intentions and in its closing statement asked that the jury draw an unfavorable inference); *United*

States v. *Maloney, supra* (where the State had forced three separate witnesses to claim their intentions); *United States* v. *Coppola, supra* (where the prosecutor's comments in summation were combined with clear abuse during examination).

Here, the only actual transgression committed by the prosecutor was the brief comment in final argument. Vernale was called to the stand for proper reasons and without any advance knowledge by the prosecution of his intention to refuse to testify. Once the witness claimed his privilege, questioning stopped almost immediately.

The second consideration under *Namet* is whether this action has added "critical weight" to the case against the defendant. *Namet* v. *United States, supra; United States* v. *King*, 461 F.2d 53 (8th Cir. 1972); *Cota* v. *Eyman, supra; United States* v. *Maloney, supra.* The witness' refusal to testify regarding transactions in which he was allegedly involved with the defendant may be taken to be evidentiary and not subject to cross-examination, *United States* v. *Maloney, supra,* p. 537. This is particularly harmful where, in an otherwise close case, "the witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant." *Namet* v. *United States, supra,* p. 189; *United States* v. *Maloney, supra; Cota* v. *Eyman, supra.*

In determining whether *critical weight* has been added to the prosecution's case the courts have looked to the surrounding circumstances of each case; *Namet, supra,* p. 186, considering a number of factors: the strength of the overall case without the claim of privilege; whether there was other evidence implicating the defendant with the witness; the extent to which the claim of privilege was placed before the jury; and whether the trial court gave any curative instructions to the jury.

In the present case, as the record demonstrates, there was plentiful evidence tending to prove that the defendant committed the crime charged, including testimony from two witnesses (John Bishop and Edward Miller) connecting Vernale and the defendant in the transactions that constituted the crime. The prosecution asked Vernale but three questions to which he invoked his privilege and mentioned the refusal to testify only briefly in final argument in what had been a long and complicated trial. The Court gave the jury a curative instruction and, while the judge preceded it with a repetition of Vernale's testimony, that instruction would have been worthless unless the evidence to which it applied had been adequately identified.

It is urged that the aforesaid facts do not fall within the line of cases where critical weight has been viewed as added to the State's case. See *Douglas* v. *Alabama, supra* (confession read before the jury in its entirety was the only evidence that defendant was the actual person who fired the murder weapon); *United States* v. *King, supra* (the prosecution examined two witnesses who claimed the privilege to a number of questions and the case against the defendant was determined to be otherwise weak); *United States* v. *Maloney, supra* at p. 538, (the court based its decision on the failure of the trial court to follow the "accredited ritual" by giving a curative instruction). Also, *United States* v. *Coppola, supra,* where the prosecution read a series of eighteen questions to the witness. The Court in *Coppola* also stated that a cautionary instruction (which the trial court neglected to give) would have made the problem less aggravated.

The instant case is clearly of a kind with those cases where no finding of critical weight was made: *Namet* v. *United States, supra* (the witness had given lengthy non-privileged testimony that implicated the defendant); *Frazier* v. *Cupp, supra* (a curative instruction prevent-

ing error); *Cota* v. *Eyman*, *supra* (the few questions to which the claim of privilege was invoked were "not the only or chief sources of the inference that the witness had engaged in the crime charged with the defendant," two other witnesses having previously testified to this); *Gerberding* v. *United States*, *supra* (where the Court found in contrast to its decision in *King*, *supra*, that the prosecution had a strong case without any possible inference arising from a claim of privilege).

As to the issue of whether the testimony of Charles Vernale added "critical weight" to the State's case, a review of the surrounding circumstances shows that the trier of the fact did not give critical weight to the testimony; rather Vernale's claim of privilege was a minor occurrence in a long and complicated trial and any prejudice that the defendant may have incurred was cured by the Court's instruction in the jury charge.

CONCLUSION

For the reasons aforesaid, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

By JOHN F. MULCAHY, JR.
By ROBERT E. BEACH, JR.
Office of the Chief State's Attorney
Drawer H, Amity Station
New Haven, Connecticut 06525
Attorneys for Petitioner

August 17, 1977

APPENDIX

APPENDIX A

Judgment, United States Court of Appeals, Second Circuit, May 31, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of May, one thousand nine hundred and seventy-seven.

Present: HONORABLE WILFRED FEINBERG
HONORABLE JOHN A. DANAHER
Circuit Judges
HONORABLE JOHN F. DOOLING, JR.
District Judge

Docket No. 76-2122

PAUL MOYNAHAN,
Petitioner-Appellee,

—against—

JOHN MANSON, Commissioner of Corrections for Connecticut,
Respondent-Appellant.

Appeal from the United States District Court for the District of Connecticut

Appendix A—Judgment, United States Court of Appeals, Second Circuit, May 31, 1977

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Blumenfeld, dated August 31, 1976, 419 F. Supp. 1139.

/s/ WILFRED FEINBERG
WILFRED FEINBERG

/s/ JOHN A. DANAHER
JOHN A. DANAHER
Circuit Judges

/s/ JOHN F. DOOLING, JR.
JOHN F. DOOLING, JR.
District Judge

APPENDIX B

Denial of Petition for Re-Hearing, July 14, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fourteenth day of July, one thousand nine hundred and seventy-seven.

Present: HONORABLE WILFRED FEINBERG
HONORABLE JOHN A. DANAHER
Circuit Judges

HONORABLE JOHN F. DOOLING, JR.
District Judge

76-2122

PAUL MOYNAHAN,
Plaintiff-Appellee,

—v.—

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

Appendix B—Denial of Petition for Re-Hearing, July 14, 1977

Ordered that said petition be and it hereby is Denied.

A. DANIEL FUSARO,
Clerk

By: LIESA BING
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fourteenth day of July, one thousand nine hundred and seventy-seven.

Docket No. 76-2122

PAUL MOYNAHAN,

Plaintiff-Appellee,

—v.—

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

APPENDIX C

Opinion of United States District Court, District of Connecticut, August 31, 1976: *Moynahan* v. *Manson, Commissioner of Correcion of the State of Connecticut, Civil* No. H-218

PAUL MOYNAHAN

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut.

United States District Court,
D. Connecticut.

Aug. 31, 1976.

Petitioner sought habeas corpus relief from his conviction of receiving stolen goods. The District Court, Blumenfeld, J., held that the trial court's refusal to allow petitioner to cross-examine an important prosecution witness concerning his possible bias due to his involvement, or suspected involvement, in the same criminal scheme, deprived petitioner of his right to confrontation; and that the prosecution's failure to disclose to petitioner evidence that witness was a target of the police investigation into the criminal scheme, was threatened with prosecution, but was in fact never charged, deprived petitioner of due process.

Writ issued.

1. Habeas Corpus—10

Fact that habeas corpus petitioner was free on bond pending outcome of petition did not deprive district court of jurisdiction. 28 U.S.C.A. § 2254.

2. Criminal Law —662(1)

Trial court's refusal to allow accused to cross-examine important prosecution witness concerning his possible bias

due to his involvement, or suspected involvement, in the same criminal scheme, deprived accused of right to confrontation; and error was compounded when accused was prohibited from calling two additional witnesses to testify concerning the other witness' involvement in criminal scheme.

3. Witnesses—372(3)

When attempting to show witness bias or interest, as opposed to bad reputation, examiner is not bound to accept witness' answer, but is free to call additional witnesses for impeachment.

4. Habeas Corpus—92(1)

District court on habeas corpus was not precluded from reviewing trial court record to determine if there was factual support for state appellate court's conclusion that petitioner had abandoned claim of error. 28 U.S. C.A. § 2254(d)(8).

5. Habeas Corpus—25.1(4)

Examination of record on petition for habeas corpus established that petitioner, having been denied opportunity by trial court to develop theory of witness bias due to criminal involvement in same scheme, chose to rest on his offer of proof rather than to submit to jury several preliminary questions which had been allowed by trial court, and that his choice did not constitute abandonment of his claim of impermissible curtailment of cross-examination. 28 U.S.C.A. § 2254(d).

6. Constitutional Law—268(5)

Where accused did not request from prosecution material specifically concerning particular witness, prosecution's failure to disclose evidence concerning that witness deprived accused of due process only if that evidence would have created reasonable doubt that did not otherwise exist.

7. Constitutional Law—268(5)

In prosecution for receiving stolen television set, prosecution's failure to disclose to accused evidence that prosecution witness was dealing in stolen televisions did not deprive accused of due process, in absence of request by accused for that evidence, in that defense was aware of witness' dealings in stolen televisions and additional evidence would not have added appreciably to accused's argument in this regard.

8. Constitutional Law—268(5)

In prosecution for receiving stolen television, prosecution's failure to disclose that key prosecution witness was target of police investigation for same criminal scheme, was threatened with prosecution, but was in fact never charged, deprived accused of due process, in that it raised reasonable doubt of accused's guilt.

9. Criminal Law—706(1)

In prosecution for receiving stolen goods, it was improper for prosecutor to call witness who allegedly sold stolen television set to accused in face of prosecutor's knowledge of that witness' intention to exercise his priv-

ilege against self-incrimination; and error was compounded when prosecutor commented in closing argument on witness' refusal to testify.

10. Habeas Corpus—25.1(9)

Evidentiary issue was not properly cognizable in habeas corpus.

11. Criminal Law—785(9)

Judge's charge cautioning jury to weigh accused's interest in outcome of trial when weighing his credibility was not erroneous.

12. Criminal Law—206

Connecticut's one-man grand jury procedure was not unconstitutional. C.G.S.A. § 54-47.

13. Grand Jury—37

Accused was not entitled to Miranda warnings prior to his appearance before grand jury.

14. Constitutional Law—268(8)

Fact that Connecticut prosecutors are appointed by the courts before whom they practice did not deny accused due process. C.G.S.A. § 51-278.

Edward F. Hennessey, III, Robinson, Robinson & Cole, Hartford, Conn., for petitioner.

Jerrold H. Barnett, Asst. State's Atty., Woodbridge, Conn., for respondent.

MEMORANDUM OF DECISION

BLUMENFELD, District Judge.

[1] The petitioner, Paul Moynahan, one-time Deputy Police Superintendent of the City of Waterbury, Connecticut, was convicted on February 4, 1970, after a jury trial, of the crime of receiving stolen goods.[1] The conviction was affirmed by the Connecticut Supreme Court. *State* v. *Moynahan*, 164 Conn. 560, 325 A.2d 199, *cert. denied*, 414 U.S. 976, 94 S.Ct. 291, 38 L.Ed.2d 219 (1973). He now seeks a writ of habeas corpus. Jurisdiction exists in this court pursuant to 28 U.S.C. §§ 2241, 2254.[2]

I. *The Petitioner's Claims*

The State accused the petitioner of having received a stolen twenty-two inch Motorola color television console from one Charles Vernale, known to the police in the Waterbury area as a dealer in stolen property. At trial, the prosecution was able to produce the affirmative evi-

---

[1] In violation of Conn. Gen. Stat. Ann. §§ 53-63, 53-65 (1960).

[2] The petitioner is currently free on bond, pending the outcome of this action. This does not, of course, affect this court's jurisdiction. *See Hensley* v. *Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973).

dence of only two witnesses; John Bishop, a convicted thief, who testified that the television set in question was one of many he had stolen in the course of several burglaries of appliance stores and that he helped Vernale deliver it to the petitioner's home;[3] and Edward Miller, a Waterbury television repairman, who identified the stolen television set, which had been found abandoned in a field, as one which he had earlier repaired in the home of the petitioner. Vernale was also called to the stand by the prosecutor, but he invoked the fifth amendment.[4] Finally, the State offered impeachment of the petitioner's denials.

Petitioner raises nine separate challenges to the conduct of his trial, which he alleges are of constitutional magnitude.[5] Of these, three merit extended discussion.

---

[3] Bishop's identification of the television is weakened by prior statements where he stated that the set in question "looked like" the one he had stolen. These statements were not released to the defense. See note 22 *infra*. Bishop also connected the petitioner to Vernale, testifying that he had seen and spoken to him at Vernale's home. Petitioner did not deny this, but claimed that Vernale had served him as a source of information.

[4] *See* IV *infra*.

[5] A tenth claim, that of ineffective assistance of counsel has been foretold if this court should refuse to pass on the denial of cross-examination claim. This claim has not been formally raised, and needless to say, has not been presented to the state courts. *Picard* v. *Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). As to the nine original claims, the State concedes exhaustion.

II. *The Right-to-Confrontation Claim*

A. *On Its Merits*

The most damaging testimony[6] against the petitioner was that given by the television repairman, Edward Miller. Mr. Miller testified that, although he had never previously met the petitioner, Mr. Moynahan had called him at home on a Sunday morning and had asked him to come to his home to repair his television set which was without sound.

Miller testified that he had gone to the petitioner's home and had discovered that the sound coil, which was enclosed in a box in the set's chassis, was broken. He further testified that he had repaired the set in the petitioner's home by opening the metal box, removing the coil, soldering the broken wire, covering the wire with electrical tape to hold it in place, and then reassembling the set, finishing the repair by soldering the metal box. For this work, he testified, the petitioner paid him $15.

He further testified that sometime later, after the State Police had found the set smashed and abandoned

---

[6] The only other witness who actually placed the set in the petitioner's home was the admitted thief, Bishop. He gave a statement to the police and testified before the grand jury that the set delivered to Moynahan was "probably" an R.C.A. color console. At trial he testified that it was a twenty-three inch, Early American style Motorola stolen from a different store at a different time. On cross-examination Bishop was shown to have made a number of prior inconsistent statements. Miller's importance was acknowledged by the State in its closing argument. See Tr. 1970-72, Exhibit 10 to Defendant's Return.

in a field, he had been able to identify it by the solder marks on the box, and that he had been present when the State Police opened the box and confirmed the presence of the electrical tape.

Petitioner claims that he was deprived of his sixth and fourteenth amendment rights to confront the witnesses against him by the refusal of the trial judge to allow him to impeach Miller's testimony by showing that Miller, himself, was a member of the stolen-goods ring[7] along with John Bishop and Vernale, and therefore had a strong personal interest in falsifying his testimony. Petitioner claimed that Miller's involvement served both to lend credence to a theory that the petitioner was being "framed" by the two witnesses, and to make Miller vulnerable to pressure from the police and prosecutors to force him to alter or color his testimony.

Petitioner claims that Miller was in fact an outlet for stolen television sets, *i.e.*, that he sold sets which he obtained from Vernale and that when repair work had to be done on sets which Vernale had sold, it was done by Miller. Petitioner attempted to present this evidence to the jury in two ways, through cross-examination of Miller himself, and through the testimony of two witnesses who would testify that they had purchased sets from Miller at unusually low prices, and that the sets had turned out to have been stolen. In both instances

[7] The existence of an extensive burglary and stolen-goods ring was brought out at trial by the State through the testimony of Captain Wayne Bishop of the State Police. Tr. 646-47, Exhibit 5 to Defendant's Return.

the trial judge rejected the offers of proof, ruling that the issues raised were collateral. While the judge allowed Miller to be examined to a limited extent concerning sales of sets which he had obtained from Vernale, in order to challenge his identification of the specific set he claimed to have repaired in the petitioner's home, he refused to allow the questioning to be expanded to show Miller's general business practices, and the obvious inference that they were dishonest and inferably in aid of a stolen radio and television ring.[8]

To the extent that the petitioner was not allowed to cross-examine Miller concerning his alleged criminal involvement, this case is governed by *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).[9] In that decision, the Supreme Court held that it was constitutional error to deny a defendant the right to develop before the jury the fact that a witness had himself been a suspect in the crime alleged, and therefore had a

[8] Tr. 496-502, Exhibit 6 to Defendant's Return.

[9] It is only fair to emphasize that *Davis* was decided after the petitioner's conviction had been affirmed, and that the trial court therefore did not have the advantage of its guidance. This is especially important since a review of the transcript clearly shows that the trial judge was extremely willing to provide the petitioner with every right which the case law, as it had been developed at that time, made clear was his due. Nevertheless, it cannot be said that the *Davis* decision significantly expanded or created a new constitutional right, *i.e.*, one which might not be cognizable in a habeas proceeding. *Chesney* v. *Robinson*, 403 F. Supp. 306, 311 n. 10 (D. Conn. 1975), *cert. denied*, — U.S. —, 97 S.Ct. 177, 50 L.Ed2d 147 (1976).

peculiar vulnerability to police pressure. The Court stated:

> "We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury those facts from which jurors, as the sole triers of fact and credibility could appropriately draw inferences relating to the reliability of the witness."

415 U.S. at 318, 94 S.Ct. at 111.

[2] Here, as in *Davis*, the petitioner was not allowed to cross-examine an important prosecution witness concerning his possible bias due to his involvement, or suspected involvement, in the same criminal scheme, and therefore was deprived of essential constitutional rights. And while *Davis* holds that, given these circumstances, no showing of prejudice is necessary, 415 U.S. at 318, 94

S.Ct. 1105, quoting *Smith* v. *Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), it is clear that the State capitalized on the defense's inability to show Miller's involvement. In his rebuttal argument, the prosecutor was able to argue:

> "Why shouldn't you believe Miller? I will tell you why you should believe him. He had no axe to grind in this case. . . .
>
> "Why does he do a thing like that? Is there some kind of inference in the background here that the Connecticut State Police got him to do it? There has been no evidence of that, not a shred of evidence of that."

Tr. 1970-71, Exhibit 10 to Defendant's Return.[10]

While this denial of cross-examination was in itself error of constitutional magnitude, the error was compounded when the defendant was prohibited from calling two additional witnesses, Stevens and Gaspari, to testify concerning the circumstances under which they purchased televisions from Miller which later proved to have been stolen.

[3] It is clear that, as a matter of evidence, when attempting to show bias or interest, as opposed to bad reputation, the examiner is not bound to accept the witness' answer, but is free to call additional witnesses for impeachment. McCormick, *Evidence* § 40 at 81 (2d ed.

---

[10] This argument borders on the unconscionable considering the prosecutor's knowledge of Miller's involvement. See II *infra*.

1972). And while the right to call additional witnesses was not at issue in *Davis*, it does fit into the phrase "to expose to the jury those facts from which [they] . . . could appropriately draw inferences . . .," and the denial of this right was likewise a denial of the sixth amendment right of confrontation. *Johnson* v. *Brewer*, 521 F.2d 556 (8th Cir. 1975).

B. *Waiver*

[4] Although the petitioner raised the issue of denial of cross-examination on appeal, the Connecticut Supreme Court refused to rule on it, holding that it had been abandoned.[11] Petitioner seeks to challenge that determination here.[12]

---

[11] "The line of inquiry which the defendant claims he was not allowed to follow was intentionally abandoned after Miller had been questioned in the absence of the jury, and therefore the claim that cross-examination was unduly restricted is utterly without merit." *State* v. *Moynahan*, 164 Conn. 560, 588, 325 A.2d 199 (1973). This holding applied only to the denial of cross-examination of Miller, the court expressly affirmed the decision to exclude the extrinsic impeachment testimony of Stevens and Gaspari.

[12] While waiver is a mixed question of law and fact, and therefore is arguably subject to the provisions of 28 U.S.C. § 2254(d), I am not precluded from reviewing the record to determine if there is factual support for the state court conclusion. § 2254(d)(8). *See Henry* v. *Mississippi*, 379 U.S. 443, 452-53, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *cf. LaVallee* v. *Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973). *See also Douglas* v. *Alabama*, 380 U.S. 415, 421-22, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Wright* v. *Georgia*, 373 U.S. 284, 289-91, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963).

[5] An examination of the transcript[13] convinces me that the conclusion of the Connecticut Supreme Court is not fairly supported by the record. 28 U.S.C. § 2254 (d)(8).

After an in-chambers discussion concerning the permissible scope of petitioner's cross-examination,[14] the trial judge allowed the petitioner's attorney to question Miller in a "dry-run" out of the presence of the jury.[15] The questions asked were to serve as an offer of proof in the event that the judge held the answers inadmissible. Objections were made by the prosecution to almost all of the questions. The judge sustained some objections but rejected others.[16] At the end of the offer, the judge ruled that all the questions which he had allowed could be read to the jury. Both sides objected to this proposal, at which time the following colloquy occurred:

> "MR. HENNESSEY: May this line of inquiry, your Honor, be considered as an offer of proof in the absence of the jury?
>
> "THE CORT: Yes, and I would suggest that the best way of handling this would be in the pres-

---

[13] Mr. Miller's testimony is contained in Exhibit 6 to Defendant's Return.

[14] The exact nature of the agreement reached in this discussion is not part of the record. It is a subject of dispute between the parties. I do not find it necessary to resolve the dispute.

[15] This examination, which takes up eleven pages of transcript, 554-64, is simply too long to reproduce, despite its importance to the resolution of this matter.

[16] Why the judge would not allow the questions to be answered out of the presence of the jury, as part of the offer of proof, is not clear.

ence of the jury, to have the reporter read the questions and the answers to the jury, and have the questions and answers appear before them rather than have you repeat them again.

"MR. HENNESSEY: Well, I didn't want to ask the quesions in their presence.

• • • • •

"MR. GAFFNEY [the prosecutor]: You know, I would just quarrel with this procedure, your Honor, because I think this is the reason we did it in the absence of the jury.

• • • • •

"MR. GAFFNEY: I would object to the procedure recommended by the Court.

• • • • •

"THE COURT: Your objection is well taken. I merely suggested it as a precaution so that the jury would not have before it anything which is improper, but if you object and your objection is sustained.

"MR. GAFFNEY: Thank you.

"MR. HENNESSEY: I won't go into this line of inquiry at all.

"THE COURT: Then that solves the whole problem.

"MR. HENNESSEY: But I would only ask that you permit me to have those portions, those questions which we have asked here be presented to the Court as an offer of proof.

"THE COURT: Any objection to that?

"MR. GAFFNEY: No objection.

"THE COURT: Very well. It is so ordered."

Tr. 564-66, Exhibit 6 to Defendant's Return.

I find it clear from this record that, having been denied the opportunity to develop the theory of bias due to criminal involvement, the defendant chose to rest on his offer of proof rather than to submit the individual preliminary questions which had been allowed to the jury. Holding this to be an abandonment of the claim of impermissible curtailment of cross-examination was clearly without basis.

III. *The Brady Claims*

The petitioner's second claim is that, despite a request for all exculpatory information in the possession of the prosecution, the State failed to timely deliver material which demonstrated Miller's criminal involvement and that he had been a target of the State Police investigation. This, the petitioner claims, violated his right to due process. *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

[6] At the outset it must be noted that, although the defense made a specific and lengthy request for exculpatory evidence, it did not request any material specifically concerning Mr. Miller. Therefore the standard this court must apply in weighing the petitioner's claim is to determine whether, had he been able to present the with-

held evidence to the jury, it would have created a reasonable doubt that did not otherwise exist. *United States* v. *Agurs*, — U.S. —, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The petitioner's claim focuses on two related areas of information which were available to the prosecution, the knowledge of Miller's criminal involvement which would have had a bearing on his state of mind, and the existence of an investigation, which would have been relevant to the issue of whether he had been threatened or promised reward by the authorities. The Connecticut Supreme Court denied the petitioner's appeal on this point because it held that he had failed to prove the existence of any material which had been withheld.[17] *State* v. *Moynahan*, 164 Conn. 560, 592-93, 325 A.2d 199 (1973).

A. *Miller's Criminal Involvement*

[7] The material retained by the prosecution does contain numerous facts which support the theory that Miller was dealing in stolen televisions. However, this

[17] At trial the petitioner had once again requested all exculpatory evidence, especially as was contained in statements made by Mr. Miller to the police or the grand jury. The trial judge refused to examine these statements *in camera* and instead ordered the prosecution to turn over any exculpatory material. The prosecution complied with this order by selecting parts of the material it had and turning those parts over to the defense. The remainder was sealed for review on appeal. It was still sealed when delivered to this court in response to my order. Faced with the similar difficulty of requiring the petitioner to prove that the retained material was, in fact, exculpatory, I ordered it released to the petitioner for the purpose of presenting this case.

was a situation already known to the defense and one which they attempted diligently to argue to the court and the jury.[18] While there were many specific additional items of evidence which were unknown to them, I am not sure that any one of them, or even their combination, would have added appreciably to the defendant's argument. This additional information cannot, therefore, be said to be material under the standard set forth in *Agurs*. Therefore I do not find that the failure to divulge this information violated the petitioner's right to due process to such a degree that it is independently remediable in habeas corpus.

B. *Miller's Vulnerability To Prosecutorial Influence*

While the petitioner's counsel had some awareness of Miller's criminal involvement, and while this does necessarily imply a certain vulnerability, *see e.g.*, *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), they were not able to confirm this inference with any factual material. Thus they were unable to contradict Miller when he testified under oath that no offers had been made to him and that he had not been the subject of an investigation.[19] Further, they were unable to

[18] The fact that the petitioner was not allowed to use the information in his possession to cross-examine Miller is not relevant in determining the materiality, under the *Agurs* standard, of the information withheld by the prosecutor. The *Brady* claim must be analyzed separately.

[19] "Q. At the time you were first questioned by the police Mr. Miller, were you told by any police that you were under investigation for anything?

* * * * *

"A. No.

[Footnote continued on following page]

counter when the State affirmatively argued that no pressure had been brought to bear. See quote on p. 1143 *supra.*

An inspection of those portions of the transcript of the police interrogation which were not disclosed to petitioner's counsel leads to the inescapable conclusion that Miller was less than candid on this point, and that the prosecutors must have been aware of it.[20] This case is

---

"Q. And at any subsequent time after that first inquiry were you told by any member of the police, or any member of the State's Attorney's office that you were under investigation?

* * * * *

"A. No.

* * * * *

"Q. Was any threat made to you that you would be arrested?

"A. No.

* * * * *

"Q. At any time did anyone make any promise to you as to what might occur if you did testify?

"A. No, there was no promise.

"Q. Well, was there any conversation about it with anyone?

* * * * *

"A. No, there was no conversation about that."

Tr. 555-57, Exhibit 6 to Defendant's Return.

[20] The transcript of Miller's interview by State Police officers on February 18, 1969, clearly discloses that Miller was a subject of the investigation and that he was threatened with prosecution. One portion, which was not turned over to the defense, contains the following exchange:

[Footnote continued on following page]

therefore similar to *Napue* v. *Illinois*, 360 U.S. 264, 269 [79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217] (1959). There the Supreme Court stated:

"Q. Well, let me put it this way: If I had nothing to hide, I wouldn't be concerned and it's very easy for me and anyone to tell the truth. It's when——

"A. Oh, I'm not trying to hide anything.

"Q. —you don't tell the truth—it's when you don't tell the truth and then you tell an untruth, and then before you know it you have to tell something else to cover that one and then before you know it you're in up to your ears. So, the best thing at this particular point is to come out with the truth, complete truth, get it all off your chest at once, and it's the end of it, and we go from there.

"Well, the point that I'm trying to make here, too, is that we've got two sets here that you've handled that are stolen, so even *if there were twenty-two sets, it isn't going to be any more difficult for twenty-two than it is for two.*

"You follow me?"

At 38-39 (emphasis added). Later a police officer stated:

"Q. And, so, this is the point that we're trying to make, Ed; we're just trying to get down to the basic facts in this thing, get it over with, *square away Ed Miller, and then we can go on. Otherwise, we're going to have to start looking at Ed Miller a little stronger.*

"You follow me, Ed?"

At 41 (emphasis added). And finally:

"Q. Yeh, I'm not talking about the east end of town. I'm talking, Ed, where you've known Charlie Vernale for a couple of years, and you've known pretty much that Charlie had an awful lot of stuff, he's handled an awful lot of stuff. He sold stuff to everybody in town, and *I'm sure that you've handled more than two sets from him.*

"As I say, our information indicates the Ed. We're verifying information. That is what we are in the process of doing right now."

At 44 (emphasis added).

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only as the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

It is not necessary for this court to find as a fact that the state prosecution knowingly abetted Miller in his false testimony, for in *Giglio* v. *United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) the Court extended the rule of *Napue* to cover "suppression of material evidence . . . 'irrespective of the good faith or bad faith of the prosecution.'" *See Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[8] The only question, then, is whether the evidence that Miller was a target of the police investigation, was threatened with prosecution, but was in fact never charged, would have been material under the test set out in *United States* v. *Agurs*, *i.e.*, whether it creates a reasonable doubt that did not otherwise exist.[21] I conclude that the answer to that question must be in the affirmative.

---

[21] Prior to the decision in *Agurs*, the rule in the Second Circuit was that the standard of materiality varied with the prosecutor's culpability. *See, e.g., United States* v. *Morell*, 524

[Footnote continued on following page]

Given the fact that Miller was the State's only "clean" witness, and that the prosecutor emphasized this fact in his argument, it would necessarily have had a definite impact on the jury had the defense been able to show not only that Miller had been a co-conspirator with John Bishop and Vernale in the stolen-goods ring, but that the State Police had been aware of this fact and for some unexplained reason had chosen not to press charges against him. It does not require an unusually agile imagination to tie Miller's testimony to his personal freedom. The suppressed evidence does, therefore, in my estimation, give rise to a reasonable doubt as to the petitioner's guilt, and in light of this fact I conclude that he was deprived of due process when the prosecution chose to suppress it.[22]

IV. *The Namet Claim*

[9] One additional claim raised by the petitioner merits discussion. Petitioner charges that the State violated his rights under the sixth and fourteenth amendments when it called Charles Vernale, the alleged central figure in the stolen-goods ring to testify despite knowl-

---

F.2d 550 (2d Cir. 1975); *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975). This rule was rejected in *Agurs*, however, in favor of a standard which varies according to the specificity of the request for disclosure.

[22] The petitioner argues that the State also suppressed exculpatory impeachment evidence concerning John Bishop, the admitted thief. A review of the evidence leads to the conclusion that although some evidence was suppressed which should have been released, no item or combination thereof was such that it could be considered material under the *Agurs* standard.

edge that Vernale would claim his rights under the fifth amendment, and then, in its closing argument, invited the jury to draw an inference from Vernale's refusal to testify.

At the trial, when the State announced its intention to call Vernale, petitioner's counsel informed the court that Vernale was then facing charges arising from the same transaction, that his court-appointed attorney was present in court, and that he believed that Vernale would refuse to testify, with the likelihood that the jury might draw adverse inferences against the defendant. The prosecutor represented that he had no knowledge of Vernale's intention to refuse to testify. He furthermore objected to the defense's suggestion of a preliminary *voir dire*, out of the presence of the jury.[23]

The trial court overruled the defense objection and allowed the State to call Vernale. After several preliminary questions, in answer to which Vernale stated that he and the defendant were friends, the following occurred:

> "Q. And tell the ladies and gentlement of the jury something about your friendship. What did it involve or entail, for example?
>
> "A. I would like to take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not my trial.

[23] In light of his knowledge of Vernale's pending criminal charges, and his objection to the *voir dire*, the prosecutor's representation is open to question.

> "Q. All right. Were you ever an informant for Mr. Moynahan?
>
> "A. Never. I was never an informer.
>
> "Q. Did you ever give him any information of any kind concerning criminal activities?
>
> "A. I take the Fifth Amendment on that. I don't want to incriminate myself in any way, also.
>
> "Q. Did you ever make a gift of a television set, a color television set, to Mr. Moynahan?
>
> "A. I take the Fifth Amendment on that. I don't want to incriminate myself."

Tr. 21-22, Exhibit 3 to Defendant's Return.

The State asked no further questions of Vernale. On cross-examination, Vernale was willing to testify on some subjects but stated his intention to invoke the fifth amendment concerning the events which underlay the charges against Mr. Moynahan. Vernale's refusal to testify was the subject of a comment by the prosecutor in his rebuttal argument,[24] as well as an instruction by the trial judge.[25]

[24] In response to the defense's attacks on the credibility of its witnesses, the prosecution admitted that neither John Bishop nor Vernale were reputable. In his reference to Vernale however, the prosecutor emphasized his refusal to testify:

> "And Charlie Vernale, who was asked, 'Did you give the defendant, Paul Moynahan, a color television set? Did you deliver it to him? And he took the Fifth Amendment. He is not a very great guy."

Tr. 1969, Exhibit 10 to Defendant's Return.

[25] Curiously, the judge repeated the offending questions in the curative instruction. He then charged however:

[Footnote continued on following page]

The question for this court is whether these occurrences combined to deprive Mr. Moynahan of his right to a fair trial, or to his right to confront a key witness against him.

At the outset, it must be noted that the practice of allowing a witness, especially one involved in the same crime, to testify with knowledge that he or she will invoke the fifth amendment has been almost unversally criticized.[26] This is because of the recognition that, even

---

"Under our Constitution Mr. Charles Vernale had the right to refuse to answer those questions on the ground of self-incrimination. [C]onsequently, you are now instructed that no inferences should be drawn by you as to what the answers might have been. And, of course, you are not to draw any adverse inferences against Mr. Paul Moynahan by reason of the fact that Charles Vernale refused to answer the questions on Constitutional grounds or, for that matter, on any other grounds."

Tr. 1993, Exhibit 8 to Defendant's Return.

[26] In its review of the trial, the Connecticut Supreme Court offered the justification that the prosecutor had to at least call the witness and have him invoke his privilege on the record in order to avoid the so-called "missing witness" charge to the effect that the jury withdraw an unfavorable inference from the founder of a party to produce a witness whom it should naturally call and whom it had the power to produce. *Queen* v. *Gagliola*, 162 Conn. 164, 168, 292 A.2d 890 (1972); *Secondino* v. *New Haven Gas Co.*, 147 Conn., 672, 675, 165 A.2d 598 (1960). However, this inference is greatly held not to apply to a witness who is privileged. 2 Wigmore, *Evidence* § 286 (2d ed. 1940). *Cf.* Rule 804(a)(1), Fed.R.Evid. *And see Thomas* v. *Genezer*, 137 Conn. 415, 422 8 A.2d 539, 543 (1951), where the court stated:

"Because of her inability, in so far as appeared, to add anything of testimonial value for the consideration

[Footnote continued on following page]

despite a curative instruction, the jury will probably not be able to resist drawing an unfavorable inference from the simple invocation of the privilege.[27] It does not, however, follow that every transgression of the desired rule warrants reversal, or as in this case, the issuance of a writ of habeas corpus.

The central case in this area is, of course, *Namet* v. *United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963), whose principle was raised to constitutional level and made applicable to state proceedings in *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). Under the rule set out in those cases, the practice of compelling a witness to invoke his fifth amendment privilege can require reversal in two circumstances: (1) when it amounts to prosecutorial misconduct, *i.e.*, when a prosecutor knowingly attempts to influence the jury through the impermissible inference, and thus deprives the defendant of his right to due process; or (2) when it allows the prosecution to add critical weight to its case by eliciting evidence of inferences in a manner which does not allow he defendant to

---

of the jury, the defendant was not in that category of witnesses who would naturally have been called to the stand."

Furthermore, as Judge Learned Hand pointed out in *United States* v. *Maloney*, 262 F.2d 533, 537 (2d Cir. 1959), in these circumstances, the interest of the defendant in avoiding an evidence of guilt simply outweighs that of the Statute in avoiding the inference which arises from not having called a particular witness.

[27] See the discussion in *In re Fernandez* 11 Conn. Sup. 53, 59 n.2, 321 A.2d 862 (Sup. .., New Haven Co. 1974).

subject the witness to cross-examination, and thus deprives him of his right to confrontation guaranteed by the sixth amendment.[28]

Unfortunately, this rule has not proved easy to apply. Because it requires a subjective weighing of the evidence submitted by the prosecution, the prosecutor's intentions, and the likely overall effect on the jury; it is not unusual that the decided cases offer no clear guideline, and in some cases appear to come to different conclusions on nearly identical facts.[29]

Among the factors which courts take into account appear to be: the prosecutor's intent in calling the witness, the number of questions which he asks, the importance of the questions to his case, whether there is a reference to the testimony in the closing argument, and whether or not the judge gives a curative instruction.[30]

---

[28] Made applicable to the states in *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

[29] *Compare Cain* v. *Cupp*, 442 F.2d 356, 358 (9th Cir. 1971), which stated:

> "Although calling the witness may not in itself be sufficient to justify habeas corpus relief, when coupled with the prosecutor's closing argument, it will justify such relief,"

with *Cota* v. *Eyman*, 453 F.2d 691 (9th Cir. 1971), *cert. denied*, 406 U.S. 949, 92 S.Ct. 2054, 32 L.Ed.2d 338 (1972), decided only eight months later, which on nearly identical facts denied relief and distinguished *Cain* on the length of the reference in the prosecutor's closing argument.

[30] The Court of Appeals for the Eighth Circuit has held that once error is committed, it cannot be cured by an instruction.

[Footnote continued on following page]

The present case appears to be the classic borderline case. The question of the prosecutor's intent is not clear. While I find that he had at least constructive knowledge of Vernale's intention to refuse to testify, there is no evidence of flagrant behavior on his part. While there were only three questions involved, one of them, the last one asked, was critical, and it was repeated in the prosecutor's rebuttal and in the trial judge's instructions.

The question of the critical weight of the inference and its impact on the jury is similarly unclear. This is probably the central factor, and at least one court has reversed a conviction on similar facts.[31] The State argues,

---

United States v. *King*, 461 F.2d 53 (8th Cir. 1972). The position of the Second Circuit is not clear. While Judge Learned Hand stated that a curative instruction could be an extenuating circumstance, *United States* v. *Maloney*, 262 F.2d 535, 538 (2d Cir. 1959), he felt bound by a line of cases whose reasoning was later rejected in *Burton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In this case, however, I do consider the curative instruction, following *Frazier* v. *Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). *And See United States* v. *Burket*, 480 F.2d 568 (2d Cir. 1973).

[31] In *United States* v. *Maloney*, *supra*, the court placed great emphasis on the quality of the other evidence before the jury. It noted:

> "The jury was unlikely to accept Parker's testimony unless it was corroborated. He had been an accomplice and hoped for lenity by inculpating his associates. Moreover, his own criminal record was extremely bad."

262 F.2d at 536.

This statement applies as well to the testimony of the admitted thief in this case, John Bishop.

however, that the inference was not critical in this case, because the testimony of John Bishop was corroborated by that of Miller. While that is no doubt true, it is also, however, the result of the two constitutional errors which I have already discussed. Had the defense been able to thoroughly cross-examine Miller, and had it had the advantage of full disclosure by the prosecutor, it would have been unlikely that Miller could have added measurably to the overall credibility of the State's case.

The prosecutor's reference in his rebuttal argument, which was clearly improper, was not especially flagrant. While he did repeat the testimony, he was content to leave it at that, and did not go the extra step of actually arguing the inference to the jury.

Finally there is the judge's curative instruction, which although intended to preclude the jury from drawing the improper inferences, actually compounded the error by refreshing the jury's memory of the critical nature of the question asked.

Fortunately, it is not necessary for me to decide whether, had this been the sole constitutional attack on the conviction, it would have merited relief in the nature of habeas corpus. It is enough to say that it was improper on the part of the prosecutor to ask the questions in the face of his knowledge of Vernale's intention, and to comment on Vernale's refusal to testify in his closing argument. This behavior significantly added to the unfairness of a proceeding which I have already found failed to meet constitutional requirements in two other respects.

V. *The Remaining Claims*

In addition to the four claims which I have outlined, the petitioner raises five additional challenges which I find do not merit extended discussion.

[10] The petitioner objects that a State Police officer was allowed to testify to his recollection of an interview with the defendant, despite the fact that the State could have introduced a verbatim transcript of the interview. Even if the petitioner were correct in his claim that this was a violation of the "best evidence" rule, and under the prevailing interpretation he is not,[32] this claim raises at best an evidentiary issue, and is therefore not properly cognizable in habeas corpus. *Grimes* v. *Wainwright*, 346 F. Supp. 713 (N.D. Fla. 1972).

[11] The objection to that part of the judge's charge which cautioned the jury to weigh the petitioner's interest in the outcome of the trial when weighing his credibility is without merit. *United States* v. *Mahler*, 363 F.2d 673, 678 (2d Cir. 1966).

[12-14] The petitioner's challenge to Connecticut's one-man grand jury procedure [33] is likewise without merit. The constitutionality of that system has been upheld on

---

[32] *See, e.g., People* v. *Swayze*, 220 Cal. App.2d 476, 34 Cal. Rptr. 5 (1963); *McCormick, Evidence* § 232 at 562-63 & n.26 (2d ed. 1972).

[33] Conn. Gen. Stat. Ann. § 54-47 (1976 Supp.).

prior occasions by this court.[34] Insofar as the petitioner claims that he must have been given the warnings prescribed in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to his appearance before the grand jury, his claim is precluded by *United States* v. *Mandujano*, 425 U.S. 564, 96 S.Ct. 1768, 42 L.Ed. 2d 212 (1976). Also without merit petitioner's claim that he was denied due process because in Connecticut the State's Attorneys, or prosecutors, are appointed by the courts before whom they practice.[35] Cf. *United States* v. *Richmond*, 277 F.2d 702, 703 (2d Cir. 1960); *United States* v. *Solomon*, 216 F. Supp. 835, 838-43 (S.D.N.Y. 1963).

Finally, the petitioner's last two challenges, that he was denied a fair trial due to pre-trial publicity, and that he was denied due process by the Connecticut Supreme Court because it failed to explicitly rule on each of the points he raised on appeal, are frivolous.

VI. *Conclusion*

Petitioner has demonstrated that his conviction was accomplished in a proceeding in which he was denied material exculpatory evidence by the prosecution, and was effectively denied the right to cross-examine two of

---

[34] *Puglia* v. *Cotter*, 333 F.Supp. 940 (D. Conn.), *aff'd mem.*, 450 F.2d 1362 (2d Cir. 1971), *cert. denied*, 405 U.S. 1073, 92 S. Ct. 1492, 31 L.Ed.2d 806 (1972); *Salvaggio* v. *Cotter*, 324 F. Supp. 681 (D. Conn.), *aff'd mem.*, 447 F.2d 1406 (2nd Cir. 1971).

[35] Conn. Gen. Stat. Ann. § 51-278 (1976 Supp.).

the three affirmative witnesses against him. In light of these errors of constitutional magnitude, his conviction cannot be allowed to stand. Therefore, unless the State shall elect to retry the petitioner within sixty days of the entry of judgment in this action, a writ of habeas corpus shall enter, and he shall be released from custody.

SO ORDERED.

APPENDIX D

Trial Testimony of Edward Miller ("dry-run")

[554]

* * * * *

EDWARD MILLER, having been previously duly sworn, resumed the stand, and testified further as follows:

(In the absence of the jury):

THE COURT: You may be seated, Mr. Miller. You may proceed, Mr. Hennessey.

BY MR. HENNESSEY:

Q. Mr. Miller, with respect to the two sets you testified to that you sold to Mr. Stevens and Mr. Gaspari, you said you obtained those from Mr. Vernale; is that not so? A. That is true.

Q. Yes, and could you tell me what the price was that you paid Mr. Vernale for those two sets?

MR. GAFFNEY: I object, your Honor.

THE COURT: What is the purpose of this question, Mr. Hennessey?

MR. HENNESSEY: I am trying to develop—well, let me withdraw the question.

Well, I suppose we have to do it this way. I thought when the jury was absent——

THE COURT: If you are going to do it, do it question by question.

MR. HENNESSEY: Okay, I will withdraw that [555] question.

THE COURT: Very well.

BY MR. HENNESSEY:

Q. When you received these sets from Mr. Vernale, did you know that they were stolen? A. No, I did not.

MR. GAFFNEY: Objection, your Honor.

THE COURT: The objection is overruled.

MR. GAFFNEY: Exception.

THE COURT: Exception.

MR. GAFFNEY: If the Court pleases, for the record, I think we can state that we have done some research on this matter. If the claim is made that——

THE COURT: The answer is, "No, I did not." It certainly is not a harmful question and answer to the State, so I am going to let it stand.

MR. GAFFNEY: All right. Exception, if the Court pleases.

THE COURT: Exception. Proceed.

BY MR. HENNESSEY:

Q. At the time you were first questioned by the police, Mr. Miller, were you told by any police that you were under investigation for anything?

[556] MR. GAFFNEY: I object, your Honor.

Appendix D—Trial Testimony of Edward Miller ("Dry-run")

THE COURT: Just a moment, please.

MR. GAFFNEY: All right, sir.

THE COURT: Read the question.

(The pending question was read back by the reporter.)

THE COURT: I will allow that question.

MR. GAFFNEY: Objection, if the Court pleases, and an exception.

THE COURT: There may be an exception noted.

A. No.

BY MR. HENNESSEY:

Q. And at any subsequent time after that first inquiry, were you told by any member of the police, or any member of the State's Attorney's office that you were under investigation?

MR. GAFFNEY: Objection.

THE COURT: Objection overruled. You may answer.

MR. GAFFNEY: Exception.

A. No.

MR. GAFFNEY: Objection.

THE COURT: The objection is sustained and the answer may go out. The question is excluded.

[557] MR. HENNESSEY: I am trying to catalogue it so I won't ask it at any time.

BY MR. HENNESSEY:

Q. Was any threat made to you that you would be arrested? A. No.

MR. GAFFNEY: Objection.

THE COURT: Objection overruled.

BY MR. HENNESSEY:

Q. The answer is no? A. No.

Q. At any time did anyone make any promise to you as to what might occur if you did testify? A. No, there was no promise.

Q. Well, was there any conversation about it with anyone?

MR. GAFFNEY: I object, your Honor.

THE COURT: The objection is overruled.

A. No, there was no conversation about that.

BY MR. HENNESSEY:

Q. Did you have any conversation with any member of the State Police or any member of the State's Attorney's office about your testimony?

MR. GAFFNEY: Objection.

[558] THE COURT: That is a pretty broad question, Mr. Hennessey. I will sustain the objection.

BY MR. HENNESSEY:

Q. You did state on previous occasions in the statement to the police that you were cooperating with the police? A. Yes, that is true. It is in the statement.

Q. Did you come to them with an indication you wanted to cooperate with them? A. Well, the State police first came to me at the store.

Q. All right. And at that time, what was the reason that they told you they were there?

MR. GAFFNEY: Objection; we are now in the realm of hearsay, your Honor.

THE COURT: Yes, I think we are getting pretty far afield now.

MR. HENNESSEY: I am not claiming it for the truth of the statement. I am claiming it for his state of mind, you understand.

In other words, obviously, what the State Police said would be hearsay unless it was circumstantial evidence.

THE COURT: Why don't you ask him what his state of mind was?

MR. HENNESSEY: Well, all right.

[559] BY MR. HENNESSEY:

Q. Tell me what was your state of mind after you talked to the police.

MR. GAFFNEY: Objection.

THE COURT: Overruled.

MR. GAFFNEY: Exception, if the Court please.

THE COURT: Exception may be noted.

A. What do you mean by that, by "state of mind"?

Appendix D—Trial Testimony of Edward Miller ("Dry-run")

BY MR. HENNESSEY:

Q. Well, did you at any time become apprehensive about this questioning? A. No, I wasn't that apprehensive about it.

Q. What would you say your attitude was or your state of mind? Do you understand now what I mean? A. My state of mind?

Q. Yes. A. Well, I told the police I would be willing to cooperate with them in any way I could.

Q. Now, you were then questioned about this transaction and several others, were you not? A. That is true.

Q. And at no time during the course of any of that questioning was there any suggestion that you yourself were [560] under investigation?

MR. GAFFNEY: I object.

THE COURT: Objection overruled.

MR. GAFFNEY: Exception, if the Court please.

THE COURT: Exception.

A. No.

BY MR. HENNESSEY:

Q. Did you, yourself, in your own mind, at the time, think you were under investigation?

MR. GAFFNEY: I object, your Honor.

THE COURT: Objection is overruled.

MR. GAFFNEY: Exception, if the Court pleases.

THE COURT: Exception.

A. No.

Appendix D—Trial Testimony of Edward Miller ("Dry-run")

BY MR. HENNESSEY:

Q. No. And no one ever said anything to you; no one ever suggested to you that if you cooperated or if you didn't cooperate, something would happen to you; nothing like that? A. That was never said, whatsoever.

MR. HENNESSEY: All right.

THE COURT: Is there anything further?

MR. HENNESSEY: Let me check with Mr. Wade, your Honor.

[561] BY. MR. HENNESSEY:

Q. When you were answering these questions, were you limiting your answers to the Moynahan situation?

MR. GAFFNEY: Object, your Honor. That is not clear to me.

THE COURT: I will sustain the objection.

BY MR. HENNESSEY:

Q. All right. The point I am trying to make is, as I was asking these questions to you about testifying about the Moynahan transaction in the case, if any promise or threats were made. A. Well, it was over the entire questioning that was on this incident, and there were no threats or promises or anything of that sort.

Q. Excuse me. When you say "incident," what are you referring to? A. The days in question that I was questioned about these matters.

Q. Are you limiting yourself to the Moynahan transaction or are you taking into account other transactions that I asked about? A. I was talking about the three days I Iwas questioned by the police last February.

Q. About the Moynahan transaction or about all the [562] transactions which they questioned you about? A. About the transactions which they asked me about on those days, which are in the transcribed report.

Q. Well, the thing was, apart from the Moynahan matter, you understand, for example, was any promise or threats or remarks made to you about the Lanza matter? A. No.

Q. Or the Griffin matter? A. No.

Q. Or the Stevens matter? A. No.

Q. Or the Gaspari matter? A. No.

Q. Or the MacIntosh matter? A. No.

Q. I take it you never at any time felt you were under investigation for any of those?

THE COURT: You asked that question before.

MR. HENNESSEY: I am sorry. I am not sure if he is limiting himself to the Moynahan matter or not.

THE COURT: It is repetitious, but I will allow you to answer it.

A. No.

[562] BY MR. HENNESSEY:

Q. Well, I asked the question, did I not, about the price, and if I am correct, your Honor sustained the objection to my question as to how much he paid Mr. Vernale for those two sets?

THE COURT: Yes, I think I sustained the objection to that question.

MR. HENNESSEY: And the next question I would ask, your Honor—You don't have to answer this—I asked him whether or not he kept any books or records with respect to those two transaction, and I would propose to have him answer that if there is no objection.

THE COURT: I will allow it.

BY MR. HENNESSEY:

Q. All right. Did you keep any books and records of those transactions?

MR. GAFFNEY: I will object.

THE COURT: Objection overruled.

MR. GAFFNEY: Exception.

THE COURT: Exception noted.

A. No, I did not.

BY MR. HENNESSEY:

Q. Well, you have no receipts?

[564] MR. GAFFNEY: I object, your Honor. He has answered the question.

THE COURT: Yes, the objection is sustained.

BY MR. HENNESSEY:

Q. All right. When you obtained the sets from Mr. Vernale did you receive any invoices?

MR. GAFFNEY: I object, your Honor.

THE COURT: Yes, we are going far afield now. I will sustain the objection.

MR. HENNESSEY: Well, the only reason I would claim that, your Honor, is that I am in-

quiring as to the regular course of this business.

THE COURT: You are going into collateral matters now which could go far afield. The objection is sustained.

MR. HENNESSEY: May this line of inquiry, your Honor, be considered as an offer of proof in the absence of the jury?

THE COURT: Yes, and I would suggest that the best way of handling this would be in the presence of the jury, to have the reporter read the questions and the answers to the jury, and have the questions and answers appear before them rather than have you repeat them again.

[565] MR. HENNESSEY: Well, I didn't want to ask the questions in their presence.

THE COURT: I think those questions to which there has been objection, and which have been sustained should be omitted from the hearing of the jury.

MR. GAFFNEY: You know, I would just quarrel with this procedure, your Honor, because I think this is the reason we did it in the absence of the jury.

THE COURT: That is correct, for counsel's guideline. Unless he wishes to withdraw these questions, I have no way.

MR. GAFFNEY: I would object to the procedure recommended by the Court.

MR. HENNESSEY: I will suggest this.

THE COURT: Your objection is well taken. I merely suggested it as a precaution so that the jury would not have before it anything which is improper, but if you object and your objection is sustained.

MR. GAFFNEY: Thank you.

MR. HENNESSEY: I won't go into this line of inquiry at all.

THE COURT: Then that solves the whole problem.

[566] MR. HENNESSEY: But I would only ask that you permit me to have those portions, those questions which we have asked here be presented to the Court as an offer of proof.

THE COURT: Any objection to that?

MR. GAFFNEY: No objection.

THE COURT: Very well. It is so ordered.

MR. GAFFNEY: And so that the record would also be clear, I then take exception to your denial of permitting me to introduce those few questions.

THE COURT: Exception may noted.

THE COURT: Anything else?

MR. GAFFNEY: No, your Honor. We can resume.

THE COURT: Summon the jury.

(Jury returns to the courtroom.)

THE COURT: All right, Mr. Hennessey, you may proceed.

MR. HENNESSEY: Thank you, your Honor.

Appendix E—Summation (Comment on invocation of Fifth Amendment privilege by witness called by State)

BY MR. HENNESSEY:

Q. Mr. Miller, you were called to testify in front of the Grand Jury, were you not? A. Yes, I was.

Q. That was subsequent to the time that you examined

* * * * *

[1969]

APPENDIX E

Summation (Comment on Invocation of Fifth Amendment Privilege by Witness called by State)

* * * * *

BY MR. SECOR:

And Charlie Vernale, who was asked, "Did you give the defendant, Paul Moynahan, a color television set? Did you deliver it to him?" And he took the Fifth Amendment. He is not a very great guy.

Well, you know, we did not pick, Mr. Gaffney and I, and the State Police, we did not pick John Bishop as our buddy, and we certainly didn't pick Charles Vernale. We cannot help it if the defendant, [1970] Paul Moynahan, has Charles Vernale as a friend. That is his privilege. We got some police information from him, too. That is his privilege. But those were his friends, not ours. And so we gave you their testimony, and we think it was confirmed by other facts in this case, in spite of their background. But let it be understood now that the people of the State of Connecticut are not representing to you, representatives of the people of the State of Connecticut, that we think John Bishop and Charles Vernale are any prize, lovely characters that we would all like to be chumming around with, or having any kind of business with, because we don't feel that way about them.

* * * * *

APPENDIX F

Curative Instruction to Jury

* * * * *

THE COURT: You will also recall, members of the jury, that during the course of this trial, Charles Vernale was called to the stand by the State. While on the stand Charles Vernale was asked this question by the State of Connecticut:

"Q. Did you ever make a gift of a television set, a color television set, to Mr. Moynahan?"

He was also asked:

"Tell the ladies and gentlemen of the jury something about your friendship. What did it involve or entail, for example?"

He was also asked:

"Q. Did you ever give him any information of any kind concerning criminal activities?"

To these questions Charles Vernale invoked and exercised his Constitutional right under the Fifth Amendment to the Constitution of the United States and refused to answer on the ground that the answers might tend to incriminate him.

Under our Constitution Mr. Charles Vernale had the right to refuse to answer those questions on the ground of self-incrimination. Consequently, you are now instructed that no inferences should be drawn by you as to what the answers might have been. And, of course, you are not to draw any adverse inferences against Mr. Paul Moynahan by reason of the fact that Charles Vernale refused to answer the questions on Constitutional grounds or, for that matter, on any other grounds.

* * * * *

APPENDIX G

Pertinent Provisions of United States' Constitution

U.S. Const., Amend. 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., Amend. 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

U.S. Const., Amend. 14:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U. S.
FILED
OCT 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-394

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,

Petitioner,

—v.—

PAUL MOYNAHAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD F. HENNESSEY
JAMES A. WADE
Robinson, Robinson & Cole
799 Main Street
Hartford, Connecticut 06103
Attorneys for Respondent

TABLE OF CONTENTS

PAGE

Opinions Below 1

Nature of Original Proceeding 1

Questions Presented 1

Statement of the Case 2

ARGUMENT:

Introduction 12

1. The Limitation of Cross-Examination Violated Respondent's Right to Confrontation 13

2. The Withholding of Evidence Constituted a Due Process Violation 15

3. The Circumstances Surrounding the Invocation of the Fifth Amendment by a Prosecution Witness Gave Rise to a Violation of the Respondent's Due Process and Confrontation Rights 20

CONCLUSION 24

TABLE OF CASES

Boone v. *Paderick*, 541 F.2d 447 (4th Cir. 1976) 19, 20

Brady v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 14, 16

Brookhart v. *Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) 13, 14, 15

Bruton v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) 23

PAGE

Cain v. *Cupp*, 442 F.2d 356 (9th Cir. 1971) .. 22, 23, 24

Chesney v. *Robinson*, 403 F. Supp. 306 (D. Conn. 1975) 14

Davis v. *Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) 14, 15

Delli Paoli v. *United States*, 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278 (1957) 23

Douglas v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) 21, 22

Fletcher v. *United States*, 332 F.2d 724 (D.C. Cir. 1964) 23

Frazier v. *Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) 22, 23, 24

Gann v. *Smith*, 318 F. Supp. 409 (N.D. Miss. E.D. 1970), *app. dis.*, 443 F.2d 352 (5th Cir. 1971) 13

Giglio v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 20

Giles v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1966) 18

Gladden v. *Frazier*, 388 F.2d 777 (9th Cir. 1968), *aff'd sub nom. Frazier* v. *Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) 24

Hamric v. *Bailey*, 386 F.2d 390 (4th Cir. 1967) .. 19

Henry v. *Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965) 13

Johnson v. *Brewer*, 521 F.2d 556 (8th Cir. 1975) .. 15

Moynahan v. *State*, 31 Conn. Sup. 296, 329 A. 2d 619 (1974) 7

Namet v. *United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963) 2, 4, 22

PAGE

Napue v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1277 (1959) 20

People v. *Mack*, 120 Ill. App. 2d 149, 256 N.E. 2d 501 (1970) 15

Pointer v. *Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) 14

San Fratello v. *United States*, 340 F.2d 560 (5th Cir. 1965) 23

State v. *Moynahan*, 164 Conn. 560, 325 A.2d 199 (1973), *cert. denied*, 414 U.S. 976 (1973) 1, 12

Terry v. *Commonwealth*, 471 S.W.2d 730 (Ky. 1971) 15

Townsend v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1962) 13

United States v. *Agurs*, — U.S. —, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) 16, 18, 19, 20

United States v. *Anderson*, 481 F.2d 685 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974) 19

United States v. *Clark*, 398 F. Supp. 341 (E.D. Pa. 1975) 24

United States v. *Cobb*, 271 F. Supp. 159 (S.D.N.Y. 1967), *aff'd*, 396 F.2d 158 (2d Cir. 1968) 19

United States v. *Croucher*, 532 F.2d 1042 (5th Cir. 1976) 14

United States v. *Donatelli*, 484 F.2d 505 (1st Cir. 1973) 19

United States v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975) 14

United States v. *Fleming*, 504 F.2d 1045 (7th Cir. 1974) 24

PAGE

United States v. *Fried*, 486 F.2d 201 (2d Cir. 1973) 20

United States v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974) 15, 22

United States v. *Harris*, 501 F.2d 1 (9th Cir. 1974) 14

United States v. *Kaplan*, 470 F.2d 100 (2d Cir. 1972) 20

United States v. *King*, 461 F.2d 53 (8th Cir. 1972) 23

United States v. *Maloney*, 262 F.2d 535 (2d Cir. 1959) 23

United States v. *Miranda*, 510 F.2d 385 (9th Cir. 1975) 14

United States v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974) 20

United States v. *Polisi*, 416 F.2d 573 (2d Cir. 1969) 19

United States v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975) 20

United States v. *West*, 486 F.2d 468 (6th Cir. 1973) 24

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-394

JOHN R. MANSON, Commissioner of Corrections of the State of Connecticut,

Petitioner,

—v.—

PAUL MOYNAHAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The respondent would direct this Court to the denial of the petition for certiorari in *State* v. *Moynahan*, 164 Conn. 560 (1973) [Docket No. 73-328, 414 U.S. 976 (1973)].

Nature of Original Proceeding

This action was commenced in the United States District Court for Connecticut pursuant to 28 U.S.C. §§ 2241, 2254.

Questions Presented

1. Did the trial court err in concluding upon a review of the state court record that the defendant had been denied his Sixth Amendment Right to Confrontation by reason of the state court's refusal to allow cross-examination of a prosecution witness with respect to matters of bias, interest or motive?

2. Did the trial court err in concluding, after a review of statements which were previously withheld by the prosecution in the state court trial notwithstanding the defendant's motion for their production, that this withholding violated the defendant's Due Process Rights?

3. Did the trial court err in concluding that the manner by which the State obtained and subsequently used the invocation of the Fifth Amendment Privilege against Self-Incrimination by a prosecution witness violated the standards set forth in *Namet* v. *United States*, 373 U.S. 179 (1963)?

Statement of the Case

The state court proceeding charged the defendant who was the then Deputy Superintendent of the Waterbury Police with receiving a stolen television set from one Charles Vernale.

The State's case rested upon three major witnesses. The first was the thief, John Bishop, who testified at the trial that a set found in the woods in a Town outside of Waterbury was one which he had stolen some years before, had delivered to Charles Vernale and at a later date, had delivered in the company of Charles Vernale to the defendant.

The second was the fence, Charles Vernale, who was called by the State and in response to questions by the State invoked the Fifth Amendment on three occasions.

The third was Edward Miller who claimed that he had repaired a set at the Moynahan home some years before and that the set identified by Bishop was the same set.

Prior to the trial an extensive request for exculpatory material had been made by the defense and was granted. However, notwithstanding the fact that the police and the State had taken numerous recorded statements and/or statements signed under oath and secret grand jury testimony from numerous witnesses including Bishop, Vernale and Miller, the only production was a one page letter from the prosecutor saying that Vernale had testified on one occasion that he had not given a television set to the defendant.

At the trial, after the direct testimony of John Bishop, the defense moved again for prior statements and testimony of this witness. The State objected but after an in camera inspection the court ordered their production in their entirety.

These statements revealed that John Bishop had given prior statements which contained different versions of the facts relating to the make, model and size of the set, the place where it was stolen and the date, time and manner of delivery. These inconsistencies were brought out on cross-examination.

Bishop also revealed that he had a lengthy past criminal record and had admitted to some 30 to 35 breaking and entries and the theft of numerous goods in these breaks, but had not yet been charged with any of these offenses. He also acknowledged that he had pleaded guilty to one charge some seven months before, but had

not been sentenced.[1] Nonetheless he denied any promise or inducement in return for his testimony except that the sentencing judge would learn of his cooperation.

During the course of its own argument to the jury the State characterized John Bishop as follows: "Now Vernale and Bishop are no prizes, . . ."

The State thereafter called Charles Vernale and the events which followed give rise to one of the points now sought to be reviewed, since the district court concluded that the situation fit the prohibition of *Namet* v. *United States*, *supra*, and later interpretations of it.

Basically the Record shows that Vernale was called by the State. The defense immediately presented a lengthy argument in the jury's absence that Vernale intended to invoke the Fifth Amendment, which invocation, if done, would violate the defendant's Sixth Amendment rights. Therefore, the court was asked to make an inquiry in the jury's absence. In support of its assertion the defense had present Vernale's court-appointed public defender, Peter Carolan, Esq. The court refused to hear him.

---

[1] Bishop admitted at the hearing on a new trial that he received a suspended sentence on this charge and was never presented on the other charges.

He also revealed that prior to Moynahan's trial he had attempted suicide while in Montville jail and had been transferred to Norwich State Hospital. This was during the time he was being interrogated by the State Police. Bishop testified that the history of that hospitalization confirmed that this suicide was brought on by the pressure being exerted on him by the State Police to give information against Moynahan. The defense was never told this before or during the Moynahan trial and did not know about it then. Also at the petition for a new trial the petitioner offered the testimony of two prison inmates and the affidavit of a third that John Bishop had stated in their presence that he had made a deal to testify against Paul Moynahan and that he was going to lie.

The court further appeared to misapprehend the argument and dismissed it in the following manner:

> "The Court: But Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has.
>
> • • • • •
>
> The Court: Mr. Hennessey, you have no right to be concerned with Mr. Vernale's rights. That is not your function as defense counsel for Mr. Moynahan. You have no standing to even make these comments to the court.
>
> • • • • •
>
> The Court: The State has the right to call anybody. The State has the right to call you. The State has the right to call me as a witness, if necessary. You have no rights here."

It did, however, finally offer to make such inquiry if the prosecutor agreed. The State still objected, relying solely on the theory that it did not know if Vernale was going to invoke the Fifth Amendment.

Vernale was then allowed to take the stand and in answer to a prosecution question he invoked the Fifth Amendment. The prosecutor then asked a second question and Vernale invoked the Fifth Amendment again.

The prosecutor then asked the following question and obtained the following answer,

> "Q. Did you ever make a gift of a television set, a color television set to Mr. Moynahan?
>
> A. I take the Fifth Amendment on that. I don't want to incriminate myself."

Thereafter during its rebuttal argument to the jury the prosecution made the following reference to Charles Vernale,

> ". . . And Charles Vernale was asked, 'Did you give the defendant, Paul Moynahan a color television set? Did you deliver it to him?' And he took the Fifth Amendment. He is not a very great guy."

The State also called Edward Miller and the circumstances surrounding his testimony give rise to the other two issues now submitted for review.

The evidence of Edward Miller offered by the State related solely to his actions as a repairman in repairing a set at the Moynahan home and later identifying a set shown to him by the State Police as the same set.

At the commencement of cross-examination Edward Miller testified that he had given statements to the Connecticut State Police on February 17, 18 and 19, 1969, and before the Grand Jury. The defendant moved for these statements and the State objected. The defense further requested an in camera inspection which the court declined to do. Rather it issued an order that the State turn over any matter which would be of assistance to the defense. The prosecutors then reviewed and redacted the statements. The redacted portions were sealed without inspection.[2]

---

[2] The Supreme Court of Connecticut declined to look at the sealed documents, since their ruling was in effect that a defendant is not entitled to relief because of a denial of production unless the defendant can demonstrate that he was prejudiced by it. Since the defendant did not know what was in the statements he could not demonstrate the harm resulting from such nondisclosure and since such harm could not be shown the Court saw no reason to

[Footnote continued on following page]

In the jury's absence the trial judge thereafter requested a statement as to the parameters of the proposed cross-examination. The defense indicated that it appeared from the facts known at that time that Edward Miller was probably linked with Charles Vernale and therefore the defense wanted to cross-examine him to establish his criminal involvement as evidence of his bias, interest or motive to testify on the State's behalf. The State objected on the ground that, since Miller had not been arrested, no such inquiry could be pursued.

The Court then adjourned without ruling and in an in chambers conference heard further argument. It then ruled that if any questions were asked in the jury's presence concerning Miller's possible criminal involvement a mistrial would be declared. The defense then requested an opportunity to examine Miller outside the jury's presence in order to establish facts for an offer of proof.

The court agreed to this procedure. However, as soon as questions touching on the purchase of sets were asked the State objected, and the court did not permit Miller to answer. As to these rulings the defense excepted in accordance with Connecticut Practice. During this inquiry the defense also asked questions concerning whether Miller was told he was under investigation, whether he was apprehensive and whether any promises, threats or inducements had been made. The witness was allowed to answer these questions and denied any promises or threats, denied any apprehension or fear during interrogation and stated that he had not been told nor did he believe that he was under investigation by the State Police.

---

see what the statements contained. The Judge at the hearing for a new trial was also asked to examine the statements but similarly declined. *Moynahan* v. *State*, 31 Conn. Sup. 296, 329 A.2d 619 (1974).

The subsequent disclosure in this proceeding of the redacted portions of the requested statements revealed that each of those answers were contradicted by the withheld evidence.

Miller was thereafter cross-examined on limited areas permitted by the court and a review of the redacted portions of his statements reveal that several of the answers on cross-examination were also false, or at least were contradictory to what he had previously told the police or one-man grand jury.[3]

After the ruling by the court barring any cross-examination relative to Miller's criminal involvement the defense tried to introduce this line of evidence collaterally through two witnesses, Stevens and Gaspari, both of whom bought stolen sets from Miller. However, upon the State's motion the jury was excused and the defense was required to question Mr. Stevens in the jury's absence. The State objected to allowing the testimony to be heard by the jury on the ground that it was an attempt to bring in collaterally what the court had already ruled out on cross-examination, i.e. to cross-examine Miller as to his possible criminal involvement. The court then ruled that no evidence from these two witnesses could be heard by jury. Exceptions to these rulings were also taken.

During the closing argument the state characterized the testimony of Edward Miller as follows:

MAIN ARGUMENT

> "... There is one man in this case that we can believe, if anybody, Ed Miller. This is the one man that we know is telling the truth. . .

[3] Miller was called by the defendant at a post-conviction hearing on a petition for a new trial and was asked whether he had committed perjury when he testified at the original trial. Miller refused to answer and invoked his Privilege Against Self-Incrimination.

REBUTTAL ARGUMENT

> "... Now Vernale and Bishop are no prizes, but what about the other witness Edward Miller. The defense has tried to get at him but had a hard time trying. You should believe Ed Miller because he has no axe to grind in this case. He has no possible motive to tell an untruth . . . Why would Ed Miller do a thing like this? He was merely questioned by the State Police. He was subjected to intensive cross-examination, which must have been unpleasant. And he only got involved because he was interviewed, since there is not one shred of an indication as to his being motivated to do harm or damage to the defendant. . . ."[4]

When the redacted portions were first reviewed by the defense pursuant to the order of the federal district court in this case, they disclosed the following examples of false or contradictory statements at trial:

1. Edward Miller answered "No" when asked if he was told by the State Police that he was under investigation whereas in truth this had been made crystal clear to him by the police.

2. He testified he was not threatened by the police when in fact he had been.

3. He testified there was no promise as to what would occur if he testified when in fact there had been.

4. He testified there wasn't even a conversation about promises when in fact there had been.

[4] With respect to this argument the federal district court noted, "This argument borders on the unconscionable considering the prosecution's knowledge of Miller's involvement." See Appendix C of Petitioner's Brief, p. 15a, fn. 10.

5. He testified that he wasn't apprehensive when being questioned by the police when in fact he had been.

6. He testified that there wasn't even a suggestion that he was under investigation when in fact there had been repeated indications that he was.

7. He testified that he didn't at any time think he was under investigation when he knew he was.

8. He testified that nothing was ever said about what would happen to him if he did or did not cooperate whereas there was in fact such conversation.

9. He testified that during the entire period of interrogation by the police there were no threats or promises when in fact there had been.

10. He testified that no promise, threat or remark had been made to him with respect to the Lanza, Griffin, Stevens, Gaspari or MacIntosh matters when in fact there had been.

11. He testified that he never felt he was under investigation for any of those five matters when in fact he knew he was.

12. He testified on cross-examination that Charles Vernale was a customer of Miller & Fellin, Inc. whereas the redacted evidence shows that Miller did all his business with Vernale after hours; that none of the work was put in the records of Miller & Fellin, Inc. and that Vernale would call Miller & Fellin, Inc. but would hang up if anyone except Mr. Miller answered.

13. He testified on cross-examination that he only did repairs on sets at Vernale's request on two occasions, whereas in the redacted testimony he admitted first that he had repaired sets a lot of times at Vernale's request and specifically identified 10 different persons and occasions when he did such repairs.

14. In line with 13. the redacted statement of Captain Wayne Bishop of the Connecticut State Police before the Grand Jury was that Miller had claimed he repaired 7 or 8 sets at Vernale's request.

15. He testified on cross-examination that he had repaired only one set on one occasion at Vernale's home, whereas in the redacted statements he admitted repairing several sets at Vernale's home.

16. He testified on cross-examination that he had not seen Charles Vernale since 1967 while in his redacted statement of 2/17/69 he said he had been to Vernale's house three months prior to look at a television set and furniture that Vernale had for sale.

17. The testimony of Edward Stevens which the court excluded on the State's objection was in contradiction to redacted portions of Miller's statements in several respects. One such respect was the statement of Stevens that Miller approached him in Stevens' home and offered to sell him a brand new set, whereas Miller said that Stevens asked him to sell him a set during a fortuitous meeting on the street.

18. Another such respect was Stevens' testimony that the purchase price was $549 whereas Miller had said it was $400.

19. Another such respect was Stevens' testimony that Miller told him the set was new whereas Miller had stated the set was used, and that Stevens had been told this.

20. A significant withholding was of statements of Miller concerning the prices he paid Vernale, since Miller admitted the prices were well below the cost that would be paid if the sets had been obtained through legitimate channels.

21. Another significant withholding was of the statements of Miller indicating at various times that he knew,

believed or suspected that the sets he got from Vernale were stolen either when he got them or shortly thereafter (and clearly a year or more before the police questioned him). Some of these statements clearly read as admissions of criminal knowledge and activity.

22. There were also withholdings of statements contradictory to each other. One such example would be Edward Miller's statement on 2/17/69 that he had been to Vernale's home on several occasions and that he and Vernale were friendly followed by a statement the next day that he hardly knew Vernale.

23. Another such example would be his redacted statement of 2/18/69 that he saw one or two sets at a time in Vernale's garage and his redacted grand jury testimony of 4/7/69 that he never saw a television set in Vernale's garage.

24. Another such inconsistency is found in his statement of 2/18/69 that he never repaired a set for a Mr. Zollo at Vernale's request but rather did so at Mr. Zollo's request and was paid by Mr. Zollo with his later statements before the grand jury that he did this repair at Vernale's request and was paid by Vernale.

ARGUMENT

Introduction:

Subsequent to Moynahan's conviction he appealed and thereafter petitioned for certiorari on all the issues now before this Court which petition was denied. *State* v. *Moynahan*, 164 Conn. 560, 325 A.2d 199 (1973), *cert. denied*, 414 U.S. 976 (1973).

The points now presented to this Court are the same issues, presented in converse form, which this Court did not consider necessary for review at that time. [See

Petition of Paul Moynahan for a Writ of Certiorari, Docket No. 73-328, Part III. Questions Sought To Be Reviewed, 1, 2, 5 and 6.] The respondent submits that less reason now exists since the converse of the issues raises no more than an argument over interpretation of settled constitutional principles.

1. The Limitation of Cross-Examination Violated the Respondent's Right to Confrontation.

The issue of the abridgement of the petitioner's Sixth/Fourteenth Amendment Right to Confrontation was properly found in favor of the respondent.

In this regard the District Court properly concluded that it was not bound by the Connecticut Supreme Court's conclusion of abandonment, since in the context of a review of the Record, that ruling was one of law, as it merely involved a determination of whether the necessary objections and exceptions were taken as required by Connecticut law. Consequently, the district court was free to reach its own independent conclusion. *Townsend* v. *Sain*, 372 U.S. 293 (1962).

Still further it is recognized that the waiver of a constitutional right to cross-examine is a federally reviewable matter. *Brookhart* v. *Janis*, 384 U.S. 1, 3-4 (1966).

In addition, insofar as the trial court's evidential ruling abridged a constitutional right they might be reviewed even if no objection were taken. *Gann* v. *Smith*, 318 F. Supp. 409, 412 (N.D. Miss. E.D. 1970), *app. dis.*, 443 F.2d 352 (5th Cir. 1971).

Thus, for several reasons, the court correctly concluded that a review of the threshold issue of abandonment was open to it. *Henry* v. *Mississippi*, 379 U.S. 443, 452-3 (1965).

Insofar as the merits are concerned it appears clear that the right to cross-examine with respect to a prosecution witness' bias, interest or motive is an integral part of the Sixth Amendment Right to Confrontation. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *United States* v. *Harris*, 501 F.2d 1, 9 (9th Cir. 1974).

While the State argues that retroactivity bars the subsequent application of *Davis* v. *Alaska*, *supra*, it seems clear that the right recognized was not newly found since the application of the Confrontation Clause to cross-examination was already established by *Brookhart* v. *Janis*, *supra*, at p. 4; *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). Consequently *Davis* v. *Alaska*, *supra*, merely represents an application of a settled rule to a particular set of facts rather than the expression of a new rule of law. *Chesney* v. *Robinson*, 403 F. Supp. 306, 311, fn. 10 (D. Conn. 1975) (also by Judge Blumenfeld).

Recent applications of *Davis* v. *Alaska*, *supra*, confirm its applicability to this case. Thus in *United States* v. *Croucher*, 532 F.2d 1042, 1045 (5th Cir. 1976) error was found in the fact that the trial judge barred the defense from inquiring about a witness' pending arrest in order to show his "vulnerability to pressure by the prosecution at the time he gave his testimony". See also *United States* v. *Miranda*, 510 F.2d 385 (9th Cir. 1975).

The State's reliance on the Second Circuit's decision in *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975) does not seem well taken. It was recognized in that case that there was no evidence that the line of inquiry was real, since the court indicated that there was no *Brady* material produced and no claim that the prosecution failed to discharge its duty. *Ibid.* Therefore the case merely holds that it was not constitutional error to deny a right to ask questions about a promise of immunity when it appears that there was in fact no such promise.

The case under consideration is thus readily distinguishable since there was a substantial valid basis for cross-examination of Edward Miller. Therefore the denial of the right must be deemed to be reversible error. And this would be so even if there were no proof of prejudice. *Davis* v. *Alaska*, *supra*, at p. 318; *Brookhart* v. *Janis*, *supra*, at p. 3. Of course, in this case there would be prejudice in view of the importance of Miller and the later argument relative to his testimony. *United States* v. *Gerard*, 491 F.2d 1300, 1304 (9th Cir. 1974); *Terry* v. *Commonwealth*, 471 S.W. 2d 730, 732 (Ky. 1971); *People* v. *Mack*, 120 Ill. App. 2d 149, 256 N.E.2d 501 (1970).

Finally it should be noted that the same rule applies whether the denial is of the right of cross-examination to establish bias, interest or motive or of the admission of collateral evidence on this point, i.e., the Stevens and Gaspari testimony. *Johnson* v. *Brewer*, 521 F.2d 556, 561-2 (8th Cir. 1975).

Thus for this reason alone the district court was warranted in ordering a new trial.

2. The Withholding of Evidence Constituted a Due Process Violation.

It should be clear from the record in this case that exhaustive efforts were made by the defense to try and get evidence in the State's possession which would fit the constitutionally defined parameters of the State's duty to produce.

It filed a motion for exculpatory evidence long before trial which included specific requests for Grand Jury testimony and prior statements to the police. That motion was granted but it produced nothing. This prompted defense counsel to write to the State's Attorney to remind

him that exculpatory evidence had been requested. This resulted in a letter from the State's Attorney, which was the only production made by the State.

Thereafter the defense made a specific request for Edward Miller's statements and transcripts before cross-examination. The court granted the motion and directed the State to produce all material which might be of assistance to the defense. However, it declined to review the material but rather left it to the State to redact these statements. These redactions constituted the material first reviewed by the district court.

The district court in ruling in the respondent's favor found that the withholding of redacted statements of Edward Miller which related to his vulnerability to prosecutorial influence provided a ground for relief although the withholding of evidence dealing with his criminal involvement did not. In doing so the court approached the case from the standpoint of the law expressed in *United States* v. *Agurs*, — U.S. —, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976).

Needless to say the respondent agrees with the favorable portion of the district court's conclusion. He would, nonetheless, assert that there was too narrow an application of *Agurs* to the facts of the case.

Agurs actually addresses three potential situations: (1) where there has been a failure to disclose evidence indicating the commission of perjury, whether requested or not; (2) where there has been a failure to produce specifically requested evidence, which although not indicative of perjury, would nonetheless fit the request and be of assistance and (3) where there has been either a general request for all "*Brady* material" or "exculpatory information" or no request at all. *Id.*, 49 L.Ed. 2d at 349-352.

The conclusion of the majority seems to be that in case (1) materiality is not key since the acquiescence by the prosecution in perjury is in itself the matter which demands the remedy. Likewise in case (2) the knowing refusal of the prosecution to respond to a specific request may demand a remedy without regard for the ultimate materiality of the withheld information as measured by the potential which it might have on the outcome of the case. However, in situation (3) proof of materiality is clearly required. *Ibid.*

In this instance the respondent sees the case as falling more closely into both (1) and (2) than into (3).

First of all it is hard to see how the prosecution could sit back and allow the answers Edward Miller gave which are referenced in (1) through (11), all of which dealt with the influence of prior police interrogation on Miller's in-court testimony, since the answers he gave in court seem palpably false when measured against those earlier statements.

In like vein it seems hard to understand how the answers referred to in (12) through (24) *supra* do not also raise serious questions of perjury.[5]

In any event the respondent would suggest that the requests relative to Miller if not governed by case (1) would nonetheless fit case (2).

The pretrial request was general in requesting all exculpatory material but specific in requesting material relative to John Bishop and Charles Vernale. While Edward Miller was not included the respondent would suggest that it does not inevitably follow that his prior statements fall into case (3).

---

[5] Footnote 3, *supra*.

First of all it appears that the State presented Miller as its only "clean" witness. See Petitioner's Brief, Appendix C, p. 25a. However, this does not mean that it was unaware of him or did not have him clearly in mind when the initial request for exculpatory material was made. Indeed, it seems obvious that situations will exist where the prosecution will have a key witness whom they wish to hide in which case they will ignore any revelation which might expose that witness. Therefore, it begs the issue to conclude that the knowing refusal to produce exculpatory matter concerning such a witness will be measured by the specificity of the defendant's request.

In any event it should be recognized that after Edward Miller's direct testimony there was a specific request and a *Giles* v. *Maryland*, 386 U.S. 66 (1966) order of production. Therefore the withheld statements of Miller were in fact withheld after a specific order of production. Consequently if the facts before trial did not bring the case into a (2) category the facts at trial did.

The significance of withholding in the (2) case situation was stressed by Justice Stevens in *Agurs*,

> "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.*, 49 L.Ed 2d at 351.

The argument to the district court in this case also covered a broader spectrum of concerns than were ultimately found necessary to be considered, since respondent also stressed what he had argued both before the original trial and particularly during the motion for mistrial. That argument was that there in fact had never been a proper and timely response to the pretrial motion because (1) all the exculpatory evidence relating to

John Bishop was withheld until after the trial began notwithstanding the pretrial order to produce it; (2) the same was true as regarded Miller and Vernale, except that some was withheld during the trial as well and (3) as a result the defense never had proper production in a fashion appropriate to permit meaningful use of it. Particular reliance for this argument was on *United States* v. *Anderson*, 481 F.2d 685, 690 fn. 2 (4th Cir. 1973), *aff'd* 417, 211 (1974); *United States* v. *Donatelli*, 484 F.2d 505, 508 (1st Cir. 1973); *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967), *aff'd* 396 F.2d 158 (2d Cir. 1968); *Hamric* v. *Bailey*, 386 F.2d 390, 393 (4th Cir. 1967).

Consequently the respondent believes that the issue of conscious prosecutorial withholding of exculpatory material has broader constitutional implications in this case than the district court found necessary to ascribe to it.

In any event the district court was correct in its conclusion even if the issue is limited to the evidence referred to by it and even if it is considered to be a case (3) situation. This conclusion is fortified by the recent holding of the Fourth Circuit in *Boone* v. *Paderick*, 541 F.2d 447 (4th Cir. 1976). In that case the court held that the failure of the prosecution to reveal the existence of prior statements bearing upon a key witness' motive to testify for the state was a ground for relief under *United States* v. *Agurs*, *supra*, particularly where the arguments of the prosecution may have led the jury to believe that the witness was testifying without such motivation.

The *Boone* decision bears many similarities to the present one since defense counsel in that case likewise suspected prior influence but could not prove it, *Id.* at 449, and since the prosecution likewise sat quietly by

while the witness denied any promises or threats and then used such supposed absence as a basis for arguing to the jury. The case is also significant since the court found that while there might be a distinction sufficient to remove the in-court answers from the classification of clear perjury, they were nonetheless on the "edge of perjury". *Id.* at p. 450. In this case it would seem that the statements are well inside of those "edges" and the case is therefore stronger than the situation presented in *Boone.*

Finally the respondent submits that the nature of the withheld evidence and the importance of Miller as a witness makes it apparent that the "materiality" required in a (3) situation has been met. In this regard the respondent believes that *Agurs* sought mainly to clarify the standards governing the duty of disclosure and not to change the prior law with respect to it. Thus earlier cases involving similar withholding of evidence bearing on the credibility of an important prosecution wtness would also support the conclusion here. Indeed such cases generally involved fact situations much less compelling than is presented in this instance. Thus their precedential value is great. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975); *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974); *United States* v. *Fried*, 486 F.2d 201 (2d Cir. 1973); *United States* v. *Kaplan*, 470 F.2d 100 (2d Cir. 1972).

3. The Circumstances Surrounding the Invocation of the Fifth Amendment by a Prosecution Witness Gave Rise to a Violation of the Respondent's Due Process and Confrontation Rights.

The situation involving the invocation of the Fifth Amendment by Charles Vernale offers a strong if not compelling example of constitutional error.

The State trial court in this case refused to consider the issue mainly because it did not comprehend the legal basis of the claim. The prosecution, however, did. Nonetheless it refused to agree to a preliminary examination notwithstanding the representations by the defense and the offer of the trial judge. What makes that position difficult to sustain on any rational basis is the subsequent conduct of the State in asking a substantially damaging question after two prior invocations of the privilege. Finally the actions of the prosecution lose any possible remaining vestige of fair procedure when the use of the invocation in argument is reviewed.

The action of the prosecution in obtaining an invocation of the Fifth Amendment in front of the jury has been held to be a violation of the Confrontation Clause. *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

The State, however, argues that its actions in this case do not compel reversal since there was no prosecutorial misconduct because it did not know that Vernale would plead the Fifth.

This argument is difficult to accept when it is recognized that (1) the defense brought it to the prosecution's attention; (2) Vernale's lawyer was in court prepared to state that he had so advised his client and expected he would invoke the Fifth; (3) the trial judge offered to inquire of Vernale whether he was going to invoke the privilege if the State agreed, but it would not; (4) the State asked Vernale a question and he invoked the Fifth; and (5) the State asked another question and Vernale invoked the Fifth.

Similarly the State now argues that its conduct cannot be harshly judged, since it only obtained three invocations of the Fifth. However, it fails to emphasize that the third question incorporated in leading form the

essential fact for which the witness was used. Therefore three questions were sufficient for it to do all the damage that the original objection envisioned.

Finally the prosecution referred to the invocation specifically in its closing argument.

The respondent thus submits that the record establishes a clear instance of an intentionally induced invocation, which practice was condemned in *Namet* v. *United States*, 373 U.S. 179 (1963); *Douglas* v. *Alabama*, *supra*; *Frazier* v. *Cupp*, 394 U.S. 731 (1969).

However, if the intention of the prosecution is not apparent nonetheless the resulting harm should be.

The case against the respondent was not a strong one. John Bishop was demeaned even by his own proponent, the State. Edward Miller's weight was enhanced by his insulation from cross-examination. Therefore, Vernale's invocation was a critical factor. And the State exploited it through its closing argument, which fact alone should establish the requisite prejudice. *Cain* v. *Cupp*. 442 F.2d 356, 358 (9th Cir. 1971); *United States* v. *Gerard*, *supra*, at p. 1304.

What the State then was really offering was the thief, who had made a deal, the middleman, who invoked the Fifth and the seller, who was concerned over his own possible arrest. Had the case proceeded in accordance with proper constitutional safeguards the jury would have heard more from the seller and less from the middleman. As it was the reverse was true, and it was error in both instances.

The other point which was considered by the district court was the impact of the attempted curative charge. The position of the defense is that such a charge cannot obviate a clear error, of the type with which we are now

involved. *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972). Judge Learned Hand agreed but felt bound by *Delli Paoli* v. *United States*, 352 U.S. 232 (1957) to rule in a contrary fashion. *United States* v. *Maloney*, 262 F.2d 535, 538 (2d Cir. 1959). However, *Delli Paoli* was subsequently overruled by *Bruton* v. *United States*, 391 U.S. 123 (1968).

The previously cited cases express the rule that either (1) when there has been conduct of the prosecution which induced an invocation of the privilege or (2) where there has been an invocation by an important witness to a question which would permit an inference as to a critical fact in issue then the force of either such occurrence cannot be dissipated by a charge to the jury admonishing them to erase from their minds the occurrence itself and any inferences which they might draw from it.

A close analysis of *Frazier* v. *Cupp*, *supra*, does not suggest a contrary result. The Court there was at most concluding that in its totality the asserted error did not present a basis for reversal. In so doing it considered the curative charge in relation to the inquiry itself, the circumstances surrounding it and the overall evidence in order to assess the potential impact upon the jury. *Id.* at pp. 735-6. Therefore it was not inconsistent with *Cain* v. *Cupp*, *supra*, or the rationale of Judge Hand in *United States* v. *Maloney*, *supra*, which decisions expressed the reality that once a clear error is committed a charge will not cure it.

Frazier v. *Cupp*, *supra*, can thus be viewed as merely enunciating a rule that each situation must be subjectively evaluated to determine whether there has been an error of constitutional proportion and not as a case which recognizes a charge as a cure-all for an error of the kind

falling within either (1) or (2) *supra*. This also seems to be the clear implication of later cases which applied a similar subjective test. *United States* v. *Fleming*, 504 *F*.2d 1045, 1049 (7th Cir. 1974); *United States* v. *West*, 486 F.2d 468, 472 (6th Cir. 1973); *United States* v. *Clark*, 398 F. Supp. 341, 368-9 (E.D. Pa. 1975). Such an interpretation thus harmonizes any claim of inconsistency between *Cain* v. *Cupp*, *supra* and *Frazier* v. *Cupp*, *supra*.[6]

The respondent submits that this case presents the worst of both those situations described in (1) and (2), *supra*. Therefore, an error of constitutional dimension necessarily flowed from these facts and should, standing alone, compel an order for a new trial.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

RESPONDENT, PAUL MOYNAHAN

By: EDWARD F. HENNESSEY
JAMES A. WADE

---

[6] It is worthwhile to note that *Cain* v. *Cupp*, *supra*, reflects the Ninth Circuit's own interpretation of the Supreme Court's affirmance in *Frazier* v. *Cupp*, *supra*, of an earlier Ninth Circuit decision. *Gladden* v. *Frazier*, 388 F.2d 777 (9th Cir. 1968), *aff'd sub nom. Frazier* v. *Cupp*, 394 U.S. 731 (1969).